CHAP. XXV.

Concerning the forms of indictments *in particular, and the* ſeveral parts *thereof.*

THE moſt conſiderable parts of an indictment in capital offenſes are, 1. The name and addition of the party offending. 2. The day and time of the offenſe committed. 3. The place where it was committed. 4. Upon or againſt whom committed. 5. The manner of the commiſſion of it. 6. The fact itſelf and the nature of it. 7. The concluſion.

This is the grammatical order, wherein things are ſet down [175] in the indictment, and upon theſe parts moſt of the conſiderations and obſervations touching indictments do ariſe, and thoſe that are not reducible to theſe heads, are partly obſerved before, and ſhall be more fully proſecuted in the end of this chapter.

I. As to the name and addition of the party indicted, this regularly ought to be inſerted, and inſerted truly in every indictment.

But if the party be indicted by a wrong chriſtian name, ſirname, or addition, and he plead to that indictment *not guilty*, or anſwers to that indictment upon his arraignment by that name, he ſhall not be received after to plead *miſnomer*, or falſity of his addition, for he is concluded and eſtopped by his plea by that name, and of that eſtoppel the gaoler and ſheriff, that doth execution, ſhall have advantage.

M. 16 *Jac.* and *P.* 17 *Jac. B. R.* Debt was brought againſt Sir *Francis Forteſcue* knight and baronet, and he appeard, and judgment given againſt him, ruled 1. That he ſhall never aſſign for error, that he was no baronet, tho baronet be parcel of the name. 2. If execution be ſued againſt him by the name of Sir *Francis Forteſcue* knight and baronet, and he brings falſe imprisonment againſt the ſheriff, the ſheriff ſhall have advantage of this eſtoppel, adjudged *(a)*.

Therefore he, that will take advantage of the *miſnomer* of his chriſtian name, addition, or ſirname, muſt do it upon his arraignment, and the entry muſt be ſpecial, *viz. ſuper quo venit* Robertus

(a) 2 *Ro*. *Rep*. 50, 88.

William

Williams, *qui indictatus eſt per nomen* Johannis Williams, *& dicit quòd ubi in indictamento ſupponitur, quòd quidam* Johannes Williams *vi & armis, &c. ipſius nomen eſt* Robertus *& non* Johannes; for, if he ſhould ſay *venit prædictus* Johannes Williams, he concludes himſelf, and cannot plead, that is name is *Robert*, and ſo I have known it ruled againſt the book of 1 *E.* 4. 2. *b.*

The miſnaming of the ſirname of the offender in an appeal is a good plea in abatement, but tho the ſirname be miſtaken in an indictment, yet it ſhall not abate. 1 *H.* 5. 5. *b. per Hankford. Stamf. P. C. Lib.* III. *cap.* 18. *tamen quære.* [176]

But the miſtake of the chriſtian name is pleadable, as well in caſe of an indictment, as an appeal, and the party ſhall be diſmiſſed from that indictment. 11 *H.* 4. 41. *b. Coron.* 88. *Stamf. P. C. ubi ſupra*, but by *Rolf* 3 *H.* 6. 26. *a.* it is no plea in an indictment *(b)*.

But the ſafeſt way is to allow his plea of *miſnomer* both as to his ſirname and as to his chriſtian name, for he that pleads *miſnomer* of either, muſt in the ſame plea ſet forth what his true name is, and then he concludes himſelf, and if the grand jury be not diſcharged, the indictment may preſently be amended by the grand jury, and returned according to the name he gives himſelf.

By the ſtatute of 1 *H.* 5. *cap.* 5. in all indictments, *&c.* the party indicted ought to have the addition of his myſtery, degree, place, and county.

Therefore, if the party indicted have no addition, or a falſe addition, he may upon his arraignment except to the former, and plead to the latter.

And if he be outlawed upon ſuch indictment, where there is no addition, or a falſe addition, he may avoid it by a writ of error, *&c.*

But altho there be no addition, yet if he appear, and plead not guilty without taking advantage of that defect, he ſhall never allege the want of addition to ſtop his trial or judgment, for by ſuch his appearance and pleading to iſſue the indictment is affirmed, and the want of addition ſalved, and the ſtatute ſatisfied. *H.* 18 *Jac. B. R. Croke*, *n.* 5. *Johnſon's* caſe *(c)*, adjudged.

The addition required by the ſtatute is of his degree, as *Yeoman*, *Gent*, *Eſq*; of his myſtery, as *huſbandman*, *ſailor*, *ſpinſter*, *&c.* therefore, if the addition be only general, as ſervant, farmer, citizen, 9 *E.*

(*b*) The words of the book are, *it is no plea in felony.* (*c*) *Cro. Eliz.* 609.

4. 48. *a.* or of crimes or miſdemeanors only, as extortioner, vagabond, heretic, 22 *E.* 4. 1. *a.* theſe are no good additions.

[177] The addition ought to be to his ſubſtantive name, not only to the *alias dictus*. *M.* 33 & 34 *Eliz. Croke, n.* 11. *Leke*'s caſe *(d)* as *A. B. alias dictus A. C. butcher*, becauſe regularly the addition refers to the laſt antecedent, and upon the ſame reaſon it is, if the indictment run Sibilla B. *nuper de* C. *uxor* Johannis B. *nuper de* C. *ſpinſter*, becauſe *ſpinſter* is an addition applicable to the huſband, as well as to the wife; but an indictment of *John B. vir*, Emelin B. *nuper de* C. *yeoman* is good, becauſe *yeoman* is not applicable to a woman, but to a man. *P.* 31 & 32 *H.* 8. *Dyer* 46, 47. adjudged, and 4 *H.* 6. 4. *b.*

Single woman is a good addition, 14 *E.* 4. 7. *b.* ſo is *widow*, 10 *H.* 6. 21. *a.* ſo is *uxor J. S.* adjudged, *P.* 42 *Eliz. B. R. Eleanor Gower*'s caſe.

An indictment againſt a peer of the realm is good without an addition, becauſe no proceſs of outlawry lies againſt him. *M.* 31 & 32 *Eliz. B. R. Croke, n.* 15. Lord *Dacre*'s caſe *(e)*.

If ſeveral perſons be indicted for one offenſe, *miſnomer* or want of addition of one quaſheth the indictment only againſt him, and the reſt ſhall be put to anſwer, for they are in law as ſeveral indictments, and ſo in treſpaſs. 7 *E.* 4. 10. *b.*

Becauſe the titles of miſnomer and addition are general titles, whereof much is ſaid in our books, as well in caſes of civil ſuits as indictments, this ſhall ſuffice in this place touching this part of the indictment.

II. Touching the time, *viz.* the year and day, wherein the fact was committed; this is neceſſary to be containd in the indictment.

Tho the day be inſerted, but not the year, the indictment is inſufficient, and it ſhall not be ſupplied by intendment of *(ultimato præteritu,)* unleſs it be ſo expreſt, but if it be ſo expreſt, it is ſufficient aſcertaining the year by the day of the ſeſſions. *Lamb.* 49.

If the ſeſſions be held the 20 day of *May*, and the indictment ſup-
[178] poſe the offenſe to be the 10 day of *Maii ultimi præteriti*, it relates to the month, if *ultimo præterito* it relates to the day by the neceſſary grammatical conſtruction, but if it be *ult' præterit'* with an abbreviation without the termination of the genitive or ablative caſe, it ſhall relate to the day, *viz.* the 10th day of the ſame *May*, as if it were in *Engliſh* the 10th day of *May* laſt paſt, it re-

(d) Cro. Eliz. 249, 198. *(e) Cro. Eliz.* 148.

lates

lates to the day and not to the month regularly, and ſo for the words next enſuing, *vide P.* 23 *Eliz. B. R. Rot.* 39. *b.* Sir *Richard Shuttleworth*'s caſe, *M.* 21 *Jac. B. R. Croke, n.* 14. *Buckley*'s caſe *(f)*.

If *A.* be indicted, that he *in feſto Sancti Petri anno* 20 *Car.* kild *J. S.* this is not good, becauſe there be two feaſts of St. *Peter*, and neither without addition. 3 *H.* 7. 5. *b. viz.* St. *Peter ad vincula*, and St. *Peter in cathedrâ.*

If *A.* be indicted, *quòd primo die* Maii *& ſecundo die* Maii *apud* D. he made an aſſault upon *B. & quandam togam ipſius* B. *adtunc & ibidem invent' felonicè cepit, &c.* this indictment is not good, becauſe there are ſeveral days mentiond before, and it is uncertain to which the felonious taking ſhall relate. 2 *H.* 7. 7. *b.* & 10 *b.*

A. is indicted, *quòd primo die* Maii *anno* 21 Eliz. *in quendam* B. *inſultum fecit & ipſum verberavit*, and ſays not *adtunc & ibidem verberavit*, yet ruled good, for the *vi & armis*, day and place named in the beginning refer to all the enſuing acts. 5 *H.* 7. 17. *b.*

But in an indictment of felony there muſt be *adtunc & ibidem* to the ſtroke or to the robbery, and the day and place of the aſſault is not ſufficient*, and this is *in favorem vitæ. P.* 43 *Eliz. B. R. Richardſon*'s caſe. And therefore it is uſual to repeat the *adtunc & ibidem* to the ſeveral parts of the fact, as in larciny or robbery from the perſon, *quòd* A. B. *die, &c. anno, &c. apud, &c. in quendam* C. D. *inſultum fecit, & bona & catalla ipſius* C. D. *ſcilicet unam togam ad valenc', &c. adtunc & ibidem inventam adtunc & ibidem felonicè cepit & aſportavit*; A. is indicted, *quòd primo die* Maii *anno* 2 Eliz. *apud* C. *habens in manu ſuâ dextrâ gladium, &c. percuſſit* B. and it is not ſaid *adtunc & ibidem percuſſit* quaſhed, becauſe the day and year, and place relate only to the having of the ſword, not to the ſtroke. *H.* 42 *Eliz. Croke, n.* 11. *Cotton*'s caſe *(g)*. [179]

If *A.* be indicted of murder or manſlaughter, as well the day and place of the ſtroke or other act done inducing, death, as of the death, muſt be expreſt, the former, becauſe the eſcheat or forfeiture of lands relates thereto, the latter, becauſe it muſt appear, that the death was within the year and day after the ſtroke.

But tho the day or year be miſtaken in the indictment of felony or treaſon, yet if the offenſe were committed in the ſame county, tho

(*f*). *Cro. Jac.* 677.
* Becauſe it is the ſtroke or robbery, which makes the felony.
(*g*) *Cro. Eliz.* 739.

at another time, the offender ought to be found guilty; but then it may be requiſite, if any eſcheat or forfeiture of land be conceived in the caſe for the petit jury to find the true time of the offenſe committed, and therefore it is beſt in the indictments to ſet down the times as truly as can be, tho it be not of abſolute neceſſity to the defendant's conviction. 2 *Co. Inſtit.* 318. *P.* 32 *Eliz. Syer's* caſe adjudged. *Co. P. C. p.* 230.

And therefore, if for that variance he be acquitted, he is erroneouſly acquitted, and yet that erroneous acquittal ſhall be a good plea of *autrefoits acquit*, for if he be afterwards indicted for the ſame felony, and the day truly ſet forth, he may aver it to be the ſame felony notwithſtanding the variance in the day. 2 *Co. Inſtit. ubi ſupra* in felony, and the ſame law is in treaſon. *Co. P. C. p.* 230.

Where the time of the day is material to aſcertain the nature of the offenſe, it muſt be expreſt in the indictment, as in an indictment for burglary it ought to ſay *tali die circa horam decimam in nocte ejuſdem diei felonicè & burglariter fregit*, yet by ſome opinion *burglariter* carries a ſufficient expreſſion, that it was done in the night.

So upon breaking a houſe in the day-time, to ouſt the offender of his clergy upon the ſtatute of 39 *Eliz. cap.* 15. it is uſual to add *tempore diurno*, for the ſtatute expreſſeth it ſo, otherwiſe, tho the indictment be good, yet he ſhall not be ouſted of his clergy.

[180] III. Touching the place where the felony is committed; regularly the vill, or hamlet and county muſt be expreſt in the indictment.

And herein much of what hath been ſaid of the time will be applicable to the place, for where the time muſt be repeated again upon ſeveral acts done, yet regularly the place alſo muſt be repeated, *viz. adtunc & ibidem.*

In ſome crimes no vill need be named, as upon an indictment of barretry, becauſe he is a barretor every where, and it ſhall be tried *de corpore comitatûs*. *T.* 43 *Eliz. B. R. Tunſtall's* caſe, but *P.* 3 *Car. B. R. Mann's* caſe the indictment was quaſhed for want of a vill alledged; the latter reſolution is fitteſt to be purſued.

Suff. In the margin, the indictment ſuppoſing a fact done *apud* S. *in com' prædict'* is good, for it refers to the county in the margin.

But if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premiſes of the indictment, the fact laid *apud* S. *in com' prædicto*

prædicto vitiates the indictment, becauſe two counties are named before, and it is uncertain to which it refers. *H.* 42 *Eliz. B. R. Croke*, *n*, 12. *Wingfield*'s caſe *(h)*.

Indictment againſt *A. B.* that he *apud* N. *in com' prædict'* made an aſſault upon *C. D.* of *F. in com' prædict'*, *& ipſum adtunc & ibidem cum quodam gladio, &c. percuſſit, &c.* this indictment is not good, becauſe two places named before, and if it refers to both, it is impoſſible, and if only to one, it muſt refer to the laſt, and then it is inſenſible. 2 *H.* 7. 10. *b. P.* 44 *Eliz. B. R. Ogle*'s caſe.

A. is indicted, *quòd ipſe tali die & anno apud* C. *in quendam* B. *inſultum fecit, & ipſum cum quodam cultello, &c. felonicè percuſſit, occidit, & murdravit* without ſaying *aatunc & ibidem percuſſit, occidit, & murdravit*, the indictment is not good, for the aſſault may be at one day and place, and the killing at another. *P.* 5 *E.* 6. *Dy.* 68, 69. 1 *R.* 3. 1. *a.*

If a man be indicted for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that it is in decay, it muſt be alleged where thoſe lands lie. 5 *H.* 7. 3. *b.* [181]

IV. Touching the name of the perſon upon whom the offenſe is committed.

An indictment of murder *cujuſdam ignoti* is good, and ſo for ſtealing of the goods *cujuſdam ignoti*, *Plo. Com.* 85. *b. Partridge*'s caſe, 1 *Mar. Dy.* 99. *a.* ſo of an aſſault *in quendam ignotum*, and if he be acquitted or convicted, and be afterwards indicted for an aſſault or murder of ſuch a man by name, he may plead the former conviction or acquittal, and aver it to be the ſame perſon. 11 *Eliz. Dy.* 285. *a.*

But an indictment, *quod invenit quendam hominem mortuum, ac felonicè furatus eſt duas tunicas*, without ſaying *de bonis & catallis cujuſdam ignoti*, is not good. 11 *R.* 2. *Enditement* 27.

If the goods of a chapel be ſtolen, the indictment ſhall ſay *bona & catalla capellæ in cuſtodiâ præpoſitorum*, if it be done in time of vacation *bona & catalla capellæ tempore vacationis*; but if the goods of a pariſh church be ſtolen, as the bell, the books, *&c.* it ſhall run *bona parochianorum de* S. *in cuſtodiâ gardianorem eccleſiæ*, and ſhall not ſuppoſe them *bona eccleſiæ*. 7. *E.* 4. 14, 15. *M.* 31 & 32 *Eliz. B. R. Hadnam* & *Green* verſus *Ringwood (i)*. *T.* 36 *Eliz. B. R. Methold* & *Barefoot*.

(h) Cro. *Eliz.* 739. *(i)* Cro. *Eliz.* 145, 179.

If the goods, which *A.* hath as executor of *B.* be ſtolen, the offender may be indicted, *quòd bona* B. *teſtatoris in cuſtodiâ* A. *executoris ejuſdem* B. *&c. Lamb.* 496. or it may be general *bona ipſius* A.

If *A.* dying, be buried, and *B.* opens the grave in the night time and ſteals the winding-ſheet, the indictment cannot ſuppoſe them the goods of the dead man, but of the executors, adminiſtrators, or ordinary, as the caſe falls out. *Co. P. C* 110 *(k)*.

If *A.* delivers goods to *B.* a common carrier to carry for him, and *B.* is robbed, the indictment may ſuppoſe them the goods of *A.* or the goods of *B.* at election, for *B.* hath a kind of ſpecial property, becauſe chargeable for them to *A.*

[182] An indictment, *quòd felonicè, &c. cepit quandam peciam panni cujuſdam* J. S. without ſaying *de bonis & catallis cujuſdam* J. S. was therefore quaſhed. *M.* 38 & 39 *Eliz. B. R. Croke, n.* 6. *Long*'s caſe *(l)*.

There is no need of an addition of the perſon robbed or murdered, *&c.* unleſs there be a plurality of perſons of the ſame name, neither then is it eſſential to the indictment, tho ſometimes it may be convenient for diſtinction ſake to add it, for it is ſufficient, if the indictment be true, *viz.* that *J. S.* was killed or robbed, tho there are many of the ſame name.

V. Touching the thing wherein or of which the offenſe is committed, there is required a certainty in an indictment.

An indictment againſt *A.* that he is *communis latro*, 29 Aſſ. 45. *communis champartor*, *conſpirator*, *confœderator*, 29 Aſſ. 45. *defamator bonorum nominis & famæ*, M. 14 Jac. B. R. Jones's *caſe (m)*, *communis malefactor*, 22 Aſſ. 73. *common robber*, 3 *E.* 2. *action ſur ſtatute* 26. *communis malegeſtûs*, *& communis perturbator pacis domini regis*, M. 6 Car. 1. B. R. *Periam*'s caſe *(n)*, are not good, becauſe they are too general and contain not the particular matter, wherein the offenſe was committed.

But *communis barrectator & pacis domini regis perturbator & litium ſeminator* is good, becauſe barretry is an offenſe known in law, and conſiſts of divers particulars, and the reſt that is added thereunto are but the aggravations of the offenſe, for barretry itſelf is the crime, *M.*

(k) Haine's caſe, 12 Co. 112.
(l) Cro. Eliz. 490.
(m) 2 *R. A.* 79. *pl.* 1.
(n) Ibid. 79. *pl.* 10.

15 *Jac. B. R. Bowſer's* caſe *(o)*; ſo an indictment, that he is *noctivagus* is good. *H.* 2 *Car.* 1. *B. R.*

An indictment againſt *A. quòd felonicè cepit & aſportavit bona & catalla* B. without ſhewing what in certain, as *ſcilicet unum equum, unum bovem*, &c. is not good. *Lamb.* 496.

The number of things ſtolen muſt be expreſt, therefore it is not ſufficient to ſay *felonicè furatus eſt aves* or *columbas* out of a dove-cote, or young hawks out of the neſt without expreſſing their number.

If theft be alledged of any thing, the indictment muſt ſet down the value, that it may appear, whether it be grand or petit larceny. *Lamb.* 497. [183]

Where theft is charged in an indictment for a living thing, as a horſe or ſheep, the regular way is to ſay *pretii* 5*s.* &c. if it be of a dead thing, that is eſtimated in the indictment by weight or meaſure, there alſo it ought to be *pretii*, and ſo it may be, if it be of any ſingle thing, tho dead, and not eſtimated by weight or meaſure.

But if it be dead things in the plural number, there it ought to be *ad valenciam. Lamb.* 497. but this I take to be but clerkſhip and not ſubſtantial, for if *pretii* be ſet inſtead of *ad valenciam*, or *e converſo*, I think it doth not vitiate the indictment, and ſo it is, if one *pretii* or *ad valenciam* be added to ſeveral things, where in true clerkſhip it ſhould be applied ſeverally, it is good if the party be convict of all, but poſſibly, if the party be convict but of part, it is not good, becauſe it will be uncertain whether grand or petit larceny. *Noy's Rep.* 115. *Wood* and *Smith*, yet *vide T.* 23 *Car.* 1. & *M.* 23 *Car.* 1. *B. R. Brook's* caſe, *and William Arundell's* caſe in [action of] treſpaſs, where there is but one *ad valenciam*, where divers goods were taken, tho it be aided after a verdict, yet, if the judgment be by *nihil dicit*, it was ruled error, and indictments are not aided by verdict.

An indictment, *quòd felonicè cepit* 20 *oves matrices & agnos* or *matrices & verveces*, is not good, becauſe it doth not appear how many of one ſort and how many of another, but 20 *oves* generally might have been good without diſtinguiſhing *matrices & verveces*, as in caſe of replevin or treſpaſs.

But an indictment *de quatuor riſcis & ciſtis, Anglicè* cheſts and coffers, is good, becauſe *ſynonyma*, *P.* 40 *Eliz. Drecot* & *Henſhaw*; regularly the ſame certainty is required in an indictment for goods, as in treſpaſs for goods, and rather more certainty, for what will be a defect

(*o*) *Ibid.* 79. *pl.* 3.

of certainty in a count will be much more defective iu an indictment, herefore for this matter *vide* title *Count & Breve per totum.*

VI. The fact itſelf muſt be certainly ſet down in an indictment.

[184] An indictment againſt *A. quòd felonice abduxit unum equum* without ſaying *cepit & abduxit* is not good, for he might have the horſe by bailment, and then it is no felony. 13 *E.* 4. 10. *a.*

An indictment of poiſoning, wherein it is alledged, that J. S. *fidem adhibens* to the priſoner, *& neſciens potum prædictum cum veneno fore intoxicatum accepit & bibit*, and ſays not *venenum prædictum*, is not good, and ſhall not be ſupplied by the implication of other parts of the indictment. 4 *Co. Rep.* 44. *b. Vaux*'s caſe.

An indictment of rape, *quòd felonice & carnaliter cognovit* without the word *rapuit* is not good, tho it concludes *contra formam ſtatuti.* 9 *E.* 4. 26. *a.*

An indictment, that A. *exoneravit quoddàm tormentum, &c. verſus* B. *dans ei unam mortalem plagam* without ſaying *percuſſit*, is not good. 5 *Co. Rep. Long*'s caſe 122. *a.*

So if it be *dedit mortalem plagam* without *percuſſit*, it is not good. *P.* 9 *Jac. B. R. Bulſtrode*'s *Rep. p.* 124.

For burglary, the offenſe muſt be *fregit & intravit.*

VII. The offenſe itſelf muſt be alledged, and the manner of it (*p*).

An indictment of felony muſt always allege the fact to be done *felonice*; an indictment of burglary muſt lay the offenſe to be *felonice & burglariter fregit & intravit*; an offenſe of high treaſon muſt be laid to be done *proditorie*; petit treaſon *felonice & proditorie*, for tho he be acquitted of the petit treaſon, he may be convict of the manſlaughter or murder.

A. is indicted, that *furatus eſt unum equum*, it is but a treſpaſs for want of the word *felonice. Stamf. P. C. p.* 96. *a.*

If *A.* be indicted, *quòd* 1 Decemb. *anno, &c. apud, &c. felonice & ex malitiâ ſuâ præcogitatâ in & ſuper* B. *inſultum fecit, & cum quodam gladio, &c. adtunc & ibidem percuſſit, & dedit eidem* B. *mortalem plagam, &c.* whereof he died, the firſt *felonice & ex malitiâ ſuâ præcogi-*

[185] *tatâ* applied to the aſſault runs alſo to the ſtroke; 1. becauſe placed in the beginning of the ſentence; 2. becauſe done *adtunc & ibidem.*

(*p*) This ſhould have been the 5th head according to our author's diviſion at the beginning of this chapter, but our author has here tranſpoſed it, and added a new fifth head *touching the thing wherein the offenſe is committed*, which makes the number of general heads in this chapter eight inſtead of ſeven.

An

An indictment of murder or manſlaughter hath theſe certainties and requiſites to be added to it more than other indictments, for it muſt not be only *felonice*, and aſcertain the time of the act done, but muſt alſo,

1. Declare how, and with what it was done, namely *cum quodam gladio, &c.*

Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as *poiſoning*, or *ſtrangling*, it doth not maintain the indictment upon evidence. 2 *Co. Inſt.* 319. *Co. P. C. p.* 48.

And if *A.* and *B.* are indicted for murder, and it is laid, that *A.* gave the ſtroke, and *B.* was preſent, aiding and abetting, yet if it falls out upon evidence, that *B.* gave the ſtroke, and *A.* was preſent, aiding and abetting, it maintains the indictment. 9 *Co. Rep. Sanchar's* caſe *(q)*.

So if *A.* be indicted for poiſoning of *B.* it muſt allege the kind of poiſon, but if he poiſoned *B.* with another kind of poiſoning, yet it maintains the indictment, for the kind of death is the ſame.

2. He muſt ſhew in what hand he held his ſword.

If an indictment runs thus, that *cum quodam gladio, quem in dextrâ ſuâ tenuit, percuſſit*, without ſaying *in dextrâ manu*, for this cauſe an indictment was quaſhed. *P.* 44 *Eliz. B. R. Cuppledick's* caſe.

3. Regularly it ought to ſet down the price of the ſword or other weapon, or elſe ſay *nullius valoris*, for the weapon is a deodand forfeited to the king, and the townſhip ſhall be charged for the value if delivered to them.

But this ſeems not to be eſſential to the indictment.

4. It ought to ſhew in what part of the body he was wounded, and therefore if it be *ſuper brachium*, or *manam*, or *latus* without ſaying whether right or left, it is not good. 5 *Co. Rep.* 121. *b. Long's* caſe.

So if it be *in ſiniſtro bracio*, where it ſhould be *brachio*, it is not good, becauſe inſenſible. *T.* 31 *Eliz. B. R. Webſter's* caſe. [186]

So if the wound be laid *circiter pectus*, it is not good. *T.* 29 *Eliz. Clenche's Rep.* 10. *Super partes poſteriores corporis*, not good. *H.* 23 *Car.* 1. *B. R. Savage's* caſe *(r)*.

But *ſuper faciem*, or *caput*, or *ſuper dextram partem corporis*, or *in infimâ parte ventris* are certain enough. *Long's* caſe, 5 *Co. Rep.* 121. *b.*

(q) 9 *Co.* 119. *a.* all that this caſe proves is only, that if a man be indicted as acceſſary to two, and he be found guilty as acceſſary to one, the verdict is good.

(r) *Styl.* 76.

5. Regularly

5. Regularly the length and depth of the wound is to be ſhewed, but this is not neceſſary in all caſes, as namely where a limb is cut off, 4 *Co. Rep.* 42. *a. Haydon*'s caſe; ſo it may be alſo a dry blow, and *plaga* is applicable to a bruiſe or a wound.

But tho the manner and place of the hurt and its nature be requiſite, as to the formality of the indictment, and it is fit to be done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it is ſufficient to maintain the indictment.

6. It is uſual to alledge the party ſtricken to have been *in pace Dei & domini regis*, but not neceſſary to be inſerted. 4 *Co. Rep.* 41. *b. Haydon*'s caſe.

7. It is neceſſary to alledge in fact, that the party wounded died of that wound, and alſo the time and place, as well of the death as of the wound given, that it may appear, that he died within the year and day of that wound, as *de quâ quidem plagâ idem* J. S. *adtunc & ibidem inſtanter obiit*, or *de quâ quidem plagâ mortali idem* J. S. *languebat, & languidus vixit uſque talem diem anno ſupradicto, quo quidem die idem* J. S. *de plagâ mortali prædictâ obiit.*

Altho as well in the indictment of manſlaughter as murder the ſtroke is to be alleged to be *mortalis plaga*, and given *felonice*, and in both caſes *interfecit*, yet in caſe of murder there is ſomewhat more to be laid, or otherwiſe it will amount but to an indictment of manſlaughter, and the offender ſhall have his clergy.

[187] And the ſpecial words in an indictment of murder are, 1. *Ex malitiâ præcogitatâ.* 2. *Murdravit*, this word *murdravit* is a word of art, and cannot be otherwiſe expreſt, therefore *murderavit* inſtead of *murdravit* vitiates an indictment of murder. *H.* 45 *Eliz. Croke, n.* 15. *Ryle*'s caſe *(s)*.

Tho *murdravit* be in the indictment, yet if it want the words *ex malitiâ ſuâ præcogitatâ*, the party ſhall have his clergy. *Dy.* 224. *b.* 11 *Co. Rep.* 37. *a.*

An indictment of treaſon for counterfeiting the king's coin ought to ſhew particularly what kind of coin, *viz. groats*, or *ſhillings*. 27 *H.* 6. *Enditement* 10. but altho it is uſual to expreſs the numbers of each kind, yet it is not of abſolute neceſſity in the indictment. *M.* 38 & 39 *Eliz. B. R. Long*'s caſe.

(s) *Cro. Eliz.* 920.

An

An indictment of high treaſon for conſpiring the king's death ought not only to contain the compaſſing or conſpiring to do the act, but muſt alſo ſet down an overt act in purſuance of it.

As in all indictments of felony there muſt be *felonice*, and of treaſon there muſt be *proditorie*, ſo it muſt be laid to be done *vi & armis* at common law. *Stamf. P. C.* 94. *a.*

But the ſtatute of 37 *H.* 8. *cap.* 8. hath now made that not to be neceſſary.

And therefore *P.* 16 *Jac. B. R. Croke, n.* 2. *Hart*'s caſe *(t)*, it was adjudged and affirmed in a writ of error, that an indictment of reſcue without the words *vi & armis* is good by reaſon of this ſtatute, which extends to make good indictments of felony, treaſon, or other miſdemeanors, notwithſtanding the omiſſion of *vi & armis*, as well as notwithſtanding the omiſſion of *gladiis, baculis & cultellis*, but this ſtatute extends not to declarations in treſpaſſes, ſuits between party and party, or informations for the king, but only to indictments.

VIII. Touching the concluſion of the indictment.

Upon an indictment of murder, where the ſtroke is ſuppoſed to be done at one day or place, and the death at another day or place, the concluſion ought not to be *& ſic felonice, voluntarie, & ex malitiâ ſuâ præcogitatâ prædictus* J. S. *præfatum* A. B. at the [188] day and place, where the ſtroke was given, *interfecit & murdravit*, this is not good, becauſe tho the ſtroke is the offenſe and cauſe of the death, yet it is neither murder nor manſlaughter till the party die. *M.* 32 & 33 *Eliz. B. R. Croke, n.* 13, *Foſter*'s caſe *(u)*.

But if it ſuppoſes the murder or manſlaughter to be where the party died, this is good, for then and not before it is murder. 4 *Co. Rep.* 41. *b. Haydon*'s caſe.

But the beſt way is *& ſic præfatus* A. *ipſum* B. *&c. modo & formâ prædictis interfecit & murdravit.* 4 *Co. Rep.* 42. *b. Haydon*'s caſe.

But if the concluſion be *& ſic præfatum* B. *apud* C. (where the ſtroke only was given) *modo & formâ prædict' interfecit & murdravit*, it is not good, for it is repugnant. *M.* 32 & 33 *Eliz. B. R. Croke, n.* 13, *Foſter* and *Hume*.

And if in the ſame caſe the concluſion be only *& ſic die & loco prædictis interfecit & murdravit*, it is doubtful whether it be good, becauſe one time and place is alleged for the ſtroke, another for the

(t) *Cro. Jac.* 473. vide *Cro. Jac.* 345. name of *Hume* and *Ogle*.
(u) *Cro. El.* 156. 4 *Co.* 42. *b.* by the

death,

death, and *(predictis)* may refer to either, *H.* 42 *Eliz. B. R. Croke, n.* 12. *Wingfield*'s caſe *(x)*.

Regularly every indictment ought to conclude *contra pacem domini regis*, for that is not taken away by the ſtatute of 37 *H.* 8. *cap.* 8.

And therefore an indictment without concluding *contra pacem, &c.* is inſufficient, tho it be but for uſing a trade not being an apprentice. *H.* 23 *Car.* 1. *B. R.* for every offenſe againſt a ſtatute is *contra pacem*, and ought ſo to be laid.

But an indictment need not conclude, *& contra coronam & dignitatem ejus*, tho it be uſual in many indictments. *M.* 23 *Car. B. R.*

An indictment that concludes *contra pacem*, and ſaith not *domini regis*, is inſufficient. *M.* 23 *Car.* 1. adjudged.

If *A.* be indicted for an offenſe ſuppoſed to be committed in the time of a former king, and concludes *contra pacem domini regis nunc*, it is inſufficient, for it muſt be ſuppoſed to be done *contra pacem* of that king, in whoſe time it was committed. [189]

But if a man be indicted in the time of one king *contra pacem domini regis nunc*, he may be arraigned for that offenſe in the time of his ſucceſſor. 1 *E.* 6. *B. Corone* 178. *Enditement* 44. neither is the indictment itſelf diſcontinued by the demiſe of the king, tho in ſome caſes the proceſs be. 7 *Co. Rep.* 30, 31.

If an offenſe be ſuppoſed to be begun in the time of one king, and continued in the time of his ſucceſſor, (as a nuiſance,) it muſt conclude *contra pacem* of both kings, or elſe it is inſufficient. *T.* 3 *Jac. B. R. Yelverton*'s *Rep.* 66. Sir *John Winter*'s caſe.

If an offenſe be alledged in the time of Q. *Eliz.* and the indictment taken in the time of K. *James*, and concludes *contra pacem nuper reginæ & domini regis nunc*, it ſeems good, and *domini regis nunc* but ſurpluſage, as well as in a count in treſpaſs. *M.* 13 *Jac. Croke, n.* 3. *Cottington* and *Wilkins*, *(z) quære.*

Touching the concluſion *contra formam ſtatuti*, ſomewhat hath been ſaid in the laſt chapter; I ſhall add ſome things more.

If an offenſe be newly enacted, or made an offenſe of an higher nature by act of parliament, the indictment muſt conclude *contra formam ſtatuti*, as an indictment for buggery, tranſporting of wool, *&c.*

Rape, tho before the ſtatute of *Weſtminſter* 2. it was a treſpaſs, yet being made felony by that ſtatute, the indictment ought to conclude *contra formam ſtatuti*, 6 *H.* 7. 5. *a.*

(x) Cro. *Eliz.* 739. (z) Cro. *Jac.* 377.

If

If an offenſe were high treaſon, &c. at the common law, and a declarative act of parliament declares it ſo, as the ſtatute of 25 *E.* 3. *de proditionibus*, the ſtatute of 3 *H.* 5. of clipping the coin, &c. till repealed by 1 *Mar.* the indictment is good with a concluſion *contra formam ſtatuti*, or without ſuch a concluſion.

But at this day the indictment for clipping, waſhing, &c. of coin enacted to be treaſon by the ſtatutes of 5 & 18 *Eliz.* muſt not only expreſs, as the ſtatute requires, that it was *(cauſa lucri,)* [190] but muſt conclude *contra formam ſtatuti.*

If an offenſe were felony at common law, but a ſpecial act of parliament ouſt the offender of ſome benefit, (that the common law allowed him,) when certain circumſtances are in the fact, tho the body of ſuch indictment muſt expreſs thoſe circumſtances according as they are preſcribed in the ſtatute, yet the indictment muſt not conclude, *contra formam ſtatuti.*

Thus the ſtatute of 21 *Jac. cap.* 27 concerning murdering of baſtard children requires proof by one witneſs, that the child was dead born, the indictment muſt ſhew, that it was a baſtard child, to bring the offender within that ſtatute, but concludes not *contra formam ſtatuti.*

So by the ſtatute of 8 *Eliz. cap.* 4. in caſes of pick-pockets, 39 *Eliz. cap.* 15. breaking houſes in the day-time, and ſtealing to the value of 5*s.* the ſtatute of 23 *H.* 8. *cap.* 1. in caſes of petit treaſon, wilful murder of malice prepenſe, robbing in or near the highway, 18 *Eliz. cap.* 7. in caſe of burglary, the ſtatute of 4 & 5 *P.* & *M. cap* 4. in caſe of malicious commanding, &c. any perſon to commit murder, robbery, wilful burning, the offenders are ouſted of their clergy; the body of the indictment muſt bring them within the expreſs purview of the ſtatutes or otherwiſe they ſhall have the benefit of clergy, but it need not conclude *contra formam ſtatuti*, neither is it uſual in ſuch caſes, for they were felonies before, and the ſtatutes do not give them a new puniſhment, nor make them to be crimes of another nature, but only in certain caſes take away clergy.

But yet, if they ſhould conclude in theſe caſes *contra formam ſtatuti*, it would not vitiate the indictment, but would be only ſurpluſage; for tho the ſtatutes do not give a new penalty, yet they take away an old privilege, when the caſe falls within the circumſtances mentiond by the act.

Upon the ſtatute of 1 *Jac. cap.* 8. ouſting perſons of clergy in caſe of ſtabbing, the other party not having a weapon drawn, nor ſtricken

firſt, I have known it held it is ſufficient, that the indictment bring the fact within the purview of the ſtatute, tho it concludes not *contra formam ſtatuti*, becauſe it was felony before, and the ſtatute only takes away clergy. *H.* 23 *Car.* 1. *Page* and *Harwood (a)*.

Yet the uſual courſe at this day is to conclude ſuch an indictment *contra formam ſtatuti*, and accordingly it hath been ruled good. *T.* 9 *Jac. B. R. Croke, n.* 4. *Bradley* and *Banks*, but it is not there queſtioned but that it may be good without it; ſo that in theſe caſes, where clergy is ſpecially ouſted by an act of parliament, the indictment is good with this concluſion or without it, but the beſt way in theſe caſes is to follow what is moſt uſual.

If an offenſe be at common law, and alſo prohibited by ſtatutes, the indictment may conclude *contra formam ſtatuti* or *ſtatutorum*; thus in barretry, tho there be no direct ſtatute againſt it by that name, yet the general tenor of the ſeveral acts running againſt it by circumlocutions, the indictment concluding *contra formam ſtatuti*, or *diverſorum ſtatutorum* is good, and it is the uſual form. *M.* 31 & 32 *Eliz. B. R. Croke, n.* 14. *Burton*'s caſe *(b)*, *H.* 9 *Car.* 1. *B. R. Chapman*'s caſe *(c)*, but it muſt conclude alſo *contra pacem*, *M.* 6 *Car. B. R. Periam*'s caſe *(d)*.

If an offenſe be at common law, and alſo prohibited by ſtatute, with a corporal or other penalty, yet it ſeems the party may be indicted at common law, and then, tho it conclude not *contra ſtatuti*, it ſtands as an indictment at common law, and can receive only the penalty, that the common law inflicts in that caſe.

Thus an indictment for a riot is good, tho it concludes not *contra formam ſtatuti*, becauſe an offenſe at common law, tho prohibited alſo by acts of parliament under ſeverer penalties. *P.* 5 *Jac. B. R. Wormall*'s caſe *(e)*.

So it ſeems, if perjury be committed, that is within the ſtatute of 5 *Eliz. cap.* 9. but concludes not *contra formam ſtatuti*, yet it
[192] is a good indictment at common law, but not to bring him within the corporal puniſhment of the ſtatute.

And yet *Mich.* 10 *Jac. B. R.* an indictment of forceable entry upon the ſtatute of 8 *H.* 6. *cap.* 9. and *Mich.* 9 *Car.* 1. *B. R.* an indictment for forgery quaſhed for not concluding *contra formam ſta-*

(a) *Aleyn* 43. *Styl* 85.
(b) *Cro. Eliz.* 148.
(c) *Cro. Car.* 340.
(d) 2 *R. A.* 82. *pl.* 5.
(e) 2 *R. A. p.* 82. *pl.* 4.

tuti,

tuti, *Smith's* caſe *(f)*; yet both theſe were offenſes at common law tho reſtitution were not at common law in the firſt caſe nor pillory and loſs of ears in the ſecond, but only fine and impriſonment, or at moſt ſtanding in the pillory, but without mutilation.

Regularly, If a ſtatute only make an offenſe, or alter an offenſe from one crime to another, as making a bare miſdemeanor to become a felony, the indictment for ſuch new made offenſe, or new made felony muſt conclude *contra formam ſtatuti*, or otherwiſe it is inſufficient.

And on the other ſide, if an offenſe be purely at common law, if it conclude *contra formam ſtatuti*, it is inſufficient, and ſhall be quaſhed, except in the inſtance above given touching clergy, *de quo ſupra*.

And therefore an indictment of battery concluding *contra formam ſtatuti* is inſufficient, and ſhall be quaſhed. *T.* 12 *Car. B. R. Croke*, *n.* 2. *Cholmley's* caſe *(g)*.

Theſe general obſervations I ſhall add touching indictments upon ſtatutes, and concluding *contra formam ſtatuti*.

Altho an indictment grounded upon a ſtatute muſt conclude *contra formam ſtatuti*, yet it is not neceſſary to recite the ſtatute in the indictment, unleſs it be a private ſtatute, whereof the court cannot take notice. *Plo. Com.* 79. *b. Patridge's* caſe. *Dy.* 347. *a.* 363. *a.*

Altho it need not recite a general penal ſtatute, yet it muſt bring the fact within the expreſs prohibition of the ſtatute, otherwiſe the concluſion *contra formam ſtatuti*, and the implication thereof will not aid the indictment, but it will be inſufficient, 9 *E.* 4. 26. *b.* As in an indictment in a *premunire* for aiding one being a principal maintainer of the juriſdiction of the ſee of *Rome contra formam ſtatuti*, yet theſe words being omitted *to the intent to ſet forth the authority*, &c. which are part of the qualification of the offenſe containd in the ſtatute, the indictment is inſufficient, and not aided [193] by the concluſion *contra formam ſtatuti*. *T.* 20 *Eliz. Dy.* 363. *a. ibid.* 347. *a.* ſo an indictment upon the ſtatute of 1 *Jac. cap.* 12. of witchcraft, if *A.* be indicted, that *exercuit incantationem*, *Anglicè* witchcraft, *contra formam ſtatuti*, without ſaying, that thereby any perſon was pined, lamed, &c. in his body, it is inſufficient, becauſe that is a circumſtance required to make it felony; but if the indictment be, that *exercuit*, *anglicè* did employ *malos & nefarios ſpiritus eâ*

(f) 2 *R. A.* 82. *pl.* 3. *(g)* *Cro. Car.* 465.

intentione

intentione to deſtroy *J. S.* this is good, tho no other event enſues, for the bare employment of evil ſpirits to or for any intent in felony. *T.* 24 *Car.* 1. *B. R.* upon an indictment removed from *St. Edmunds-Bury.*

And thus far touching the forms of indictments, wherein generally we are to take notice, 1. That none of the ſtatutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.

2. That in favour of life great ſtrictneſſes have been in all times required in points of indictments, and the truth is, that it is grown to be a blemiſh and inconvenience in the law, and the adminiſtration thereof; more offenders eſcape by the over eaſy ear given to exceptions in indictments, than by their own innocence, and many times groſs murders, burglaries, robberies, and other heinous and crying offenſes, eſcape by theſe unſeemly niceties to the reproach of the law, to the ſhame of the government, and to the encouragement of villany, and to the diſhonour of God. And it were very fit, that by ſome law this over-grown curioſity and nicety were reformed, which is now become the diſeaſe of the law, and will I fear in time grow mortal without ſome timely remedy *(h)*.

(*h*) This advice of our author would, if complied with, be of excellent uſe, for it would not only prevent the guilty from eſcaping, but would likewiſe be a guard to innocence, for thereby would be removed the only pretenſe, upon which counſel is denied the priſoner in caſes of felony; for if no exceptions were to be allowed, but what went to the merits, there would then be no reaſon to deny that aſſiſtance in caſes, where life is concerned, which yet is allowd in every petit treſpaſs.

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[194] CHAP. XXVI.

Concerning proceſs upon indictments.

IN many caſes upon an indictment proceſs of outlawry lies not at common law, nor at this day, as in an indictment of foreſtalling, 22 *E.* 4. 11. *b.* but in an indictment of treſpaſs the proceſs is *venire facias*, and when *non inventus*, is returned *capias* and *exigent.*

But in all indictments of felony or treaſon proceſs by *capias* and *exigent* lies, and at the common law in caſe of felony or treaſon there

was

was but one *capias*, and upon *non inventus* returned an *exigent* awarded, and ſo to the outlawry. 22 *Aſſ.* 81. 1 *H.* 5. 6. *a.*

But by the ſtatute of 25 *E.* 3. *cap.* 14. If a man be indicted before juſtices in their ſeſſions to hear and determine, and be returned *non eſt inventus* upon the *capias* iſſued, another writ of *capias* ſhall iſſue returnable three weeks after with a precept to ſeiſe his goods, and detain them till the precept returned, and if again *non inventus* be returned, then an exigent ſhall iſſue, and the goods forfeit, and if he yield himſelf upon the *capias*, then the goods ſaved.

This ſtatute extends not to treaſon, and therefore certainly in treaſon the exigent muſt iſſue upon *non inventus* returned upon the firſt *capias*.

And altho the ſtatute ſpeaks generally of felony, it ſeems that upon an indictment of murder the *exigent* ſhall iſſue after the firſt *capias*, as at common law, and accordingly in an appeal of robbery. 8 *H.* 5. 6. *b.* *Proceſs* 226. *Coron.* 184.

But it is ſaid, that in an indictment (or appeal) of robbery there ſhall be two *capias* in the king's bench before the exigent ſhall iſſue. 8 *H.* 5. *ubi ſupra.* *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 67. *a.*

But at this day the proceſs in caſe of an indictment of any felony is only one *capias*, and then an *exigent*. [195]

For this ſtatute of 25 *E.* 3. *cap.* 14. as to the ſecond caſe is hardly applicable to the king's bench, nor indeed well to other juſtices, that ſit by commiſſion, for the ſecond *capias* is to be returned at three weeks after, which may be out of term, or after the ſeſſion of the juſtices ended; therefore *quære* the uſage.

By the ſtatute of 8 *H.* 6. *cap.* 10. upon appeals or indictments of treaſon, felony, or treſpaſs before juſtices of peace or any other having power to take ſuch indictments or appeals, or other juſtices or commiſſioners in any county or franchiſe againſt any perſon dwelling in any other county than where the indictment or appeal is taken, after the firſt *capias*, another *capias* ſhall iſſue to the ſheriff of that county, wherein the party indicted is ſuppoſed to be converſant, returnable before the ſaid juſtices or commiſſioners three months after, *&c.* with a precept to the ſheriff to make proclamation at two county courts for his appearance at the day of the return, and then the *exigent* to iſſue upon his default, and in caſe any *exigent* be awarded, or outlawry pronounced, otherwiſe to be holden for none.

But if the party were converſant in the county where he is indicted at the time of the felony or treaſon committed, the proceſs to be, as was at common law.

A *proviſo* not to extend to the king's bench nor *Cheſter*.

By the ſtatute of 10 *H.* 6. *cap.* 6. the ſame proceſs is directed upon indictments of felony or treaſon removed into the king's bench by *certiorari*, or into any other courts.

But as to indictments of felony or treaſon originally taken in the king's bench, they are not within theſe ſtatutes, but by the ſtatute of 6 *H.* 6. *cap.* 1. there is ſpecial proviſion made, that before any *exigent* awarded the court ſhall iſſue a *capias* to the ſheriff of the county, where the indictment is taken, and another to the ſheriff of that county whereof he is named in the indictment, having ſix weeks time or more before the return, and after theſe writs returned the *exigent* to iſſue as before.

[196] Upon theſe ſtatutes, little effect hath been obtaind, for if the party were converſant in the county where the felony or treaſon was committed, (as indeed he cannot be otherwiſe,) then he may be named of that place where the fact was committed in the indictment, and then the proceſs is to go, as at common law before the ſtatutes, and this is the uſual courſe at this day, that if the felony be committed in *A.* in the county of *B.* the indictment runs only, *quòd* J. S. *nuper de* A. *in com'* B. *prædict'* (where the indictment is taken).

And upon the ſame reaſon it is, if *J. S.* be indicted in the county of *B.* for a felony there committed, and the indictment runs thus: J. S. *nuper de* A. *in com'* B. *aliàs* J. S. *nuper de* D. *in com'* S. there ſhall no proceſs go to the ſheriff of S. becauſe that addition is only in the *aliàs dictus*, which is neither material nor traverſable, and therefore proceſs ſhall iſſue only in the county of *B.* where he is indicted, and no *capias* with proclamation in the county of *S.* and the ſame law in an appeal. 1 *E.* 4. 1. *a.*

If *J. S.* be indicted in the county of *B.* in this manner; J. S *de* A. *in com'* B. *nuper de* C. *in com'* D. the *capias* ſhall iſſue only in the county of *B.* for *there* the indictment ſuppoſeth him actually converſant at the taking of the indictment; but if the indictment runs thus: J. S. *nuper de* A. *in com'* B. *nuper de* C. *in com'* D. in this caſe there ſhall go a *capias* not only into the county of *B.* where he is indicted, but upon the return thereof, (if it be before commiſſioners,)

a *ca-*

a *capias* with proclamations to the ſheriff of *D.* and (if in the king's bench upon an indictment originally found there,) one *capias* to one ſheriff, and another to the other ſheriff according to the ſtatutes of 8, 10 and 6 *Hen.* 6. above-named, becauſe he is not named *de* A. in *com'* B. but *nuper de* A. *in com'* B. and *nuper de* C. *in com'* D. and not with an *aliàs dictus*, as in the former caſe. 30 *H.* 6. *Proceſs* 192 *(h)*.

If a man be indicted by the name of J. S. *nuper de* A. *in com' Ceſtriæ*, the ſecond *capias* with proclamation ſhall be awarded to the prince or his lieutenant, 31 *H.* 6. 11. and the like to the biſhop of *Durham*, or chancellor of *Lancaſter*. [197]

There was a very ſharp, yet uſeful ſtatute, 2 *H* 5. *cap.* 9. " If " any perſon make complaint in the chancery of any felony or riot " committed, and that the offender fly or withdraw himſelf to the " intent to avoid execution of the common law, a bill thereof ſhall " be made for the king and deliverd to the chancellor, who, (if he " be duly informed, that ſuch bill containeth truth,) ſhall, at his diſ- " cretion, grant a *capias* to the ſheriff of the county where the of- " fenſe is committed, returnable in chancery at a certain day; and " if the perſons yield themſelves to the ſheriff, they ſhall be com- " mitted or baild, as the caſe ſhall require, and it ſhall be commanded " to inquire of the fact, and thereupon to be done as the law re- " quireth; but if they appear not, then a writ of proclamation to " iſſue to the ſheriff returnable in the king's bench, by which it ſhall " be commanded, that he make proclamation in two counties, that " the parties appear in the king's bench to anſwer the matters in the " bill, (the ſubſtance whereof is to be recited in the writ,) upon " pain to be convict of the offenſe, and if they come not at the day, " to ſtand attaint, and if they come *then*, the fact to be inquired of " as above.

" Provided that the ſuggeſtion of ſuch riots be teſtified to the chan- " cellor under the ſeals of two juſtices of the peace and the ſheriff " of the county before the *capias* granted, the ſubſtance of the com- " plaint to be expreſt in the writ of *capias*, and alſo in the writ of " proclamation." Like proviſion for the counties palatine.

This is marked as an obſolete ſtatute, but I know no act of parliament that repeals it, unleſs it be the implication of the ſtatute of

(*b*) And *Proceſs* 103.

16 *Car.* 1. *cap.* 10. which yet ſeems not to extend to the repeal of theſe ſtatutes, for the chancellor hath no power to hear and determine the offenſes, but only to grant preparatory proceſs to bring them *in* to anſwer according to law, for they are to be proceeded againſt by indictment, if they appear.

[198] Yet this ſtatute hath not been, that I know of, put in ure. 1. Becauſe it ſeems doubtful, whether it extends to murders or robberies, unleſs accompanied with a riot. 2. Becauſe it is left to the diſcretion of the chancellor to iſſue the proceſs. 3. Becauſe ſo many things previous to the proceſs are required, as bill, certificates, probable evidence. 4. Becauſe it takes up ſo much delay, that they may as ſoon be taken up by the ordinary way of indictment and proceſs of outlawry. 5. And eſpecially, becauſe in ſuch caſe the warrant of the chief juſtice or any other judge of the king's bench, upon oath made touching the offenſe and the offenders, reacheth all parts of *England*. 6. Becauſe it is ſo ſevere, for an innocent perſon may be convicted upon default of appearance, and yet have had no notice; but in caſe of an outlawry, tho it be an attainder in itſelf, yet ſmall exceptions are commonly allowed to the proceſs or return, and ſo by writ of error uſually and eaſily reverſible, and the party put to plead to the indictment.

But certainly it might be of great uſe to bring *in* and puniſh notorious offenders, if iſſued diſcreetly and upon great occaſions, provided the parties were firſt indicted by the grand inqueſt.

Now, for the farther declaring the buſineſs of proceſs upon indictments of felony theſe points are conſiderable. 1. Who may iſſue proceſs of outlawry. 2. Againſt whom it is to be iſſued in relation to principals and acceſſaries. 3. What the tenor of the *exigent* and outlawry. 4. What the effect or conſequence of either. 5. How avoided either by diſcontinuance, *ſuperſedeas*, or error.

I. As to the firſt of theſe, namely, who may iſſue proceſs by *capias* and *exigent*.

The court of king's bench either upon an indictment originally taken before them, or removed thither by *certiorari* may iſſue proceſs of *capias* and *exigent* into any county of *England* upon a *non eſt inventus* returned by the ſheriff of the county, where he is indicted, and a *teſtatum*, that he is in ſome other county.

[199] Juſtices of gaol-delivery regularly cannot iſſue a *capias* or *exigent*, becauſe their commiſſion is to deliver the gaol *de priſonibus*

priſonibus in ea exiſtentibus, ſo that thoſe, whom they have to do with, are always intended in cuſtody already; *vide ſupra cap. 5.*

Juſtices of *oyer* and *terminer* may iſſue a *capias* or *exigent*, and ſo proceed to the outlawry of any perſon indicted before them, directed to the ſheriff of the ſame county, where they hold their ſeſſions at common law.

But by the ſtatute of 5 *E.* 3. *cap.* 11. they may iſſue proceſs of *capias* and *exigent* to all the counties of *England* againſt perſons indicted or outlawed of felony before them.

Juſtices of peace may make out proceſs of outlawry upon indictments taken before themſelves, or upon indictments taken before the ſheriff, and returned to the juſtices of peace by the ſtatute of 1 *E.* 4. *cap.* 1. but the power of the ſheriff to make any proceſs upon indictments taken before him is taken away by that ſtatute.

The proceſs to the outlawry, *viz.* the *capias* and *exigent* muſt be in the king's name, and under the judicial ſeal of the king appointed to that court that iſſues the proceſs, and with the *teſte* of the chief juſtice, or chief judge of that court or ſeſſions.

A man is indicted by inquiſition before the coroner, *quære* if he can by law make out proceſs of outlawry; *videtur quòd ſic.* 27 *Aſſiz.* 47. *B. outlawry* 38.

II. Againſt whom proceſs of outlawry ſhall iſſue upon an indictment.

Altho in civil actions between party and party regularly a *capias* or *exigent* lies not againſt a lord of parliament of *England*, whether ſecular or eccleſiaſtical, yet in caſe of an indictment for treaſon or felony, yea, or but for a treſpaſs *vi & armis*, as an aſſault or riot, proceſs of outlawry ſhall iſſue againſt a peer of the realm, for the ſuit is for the king, and the offenſe is a contempt againſt him: And therefore, if a reſcue be returned againſt a peer, 1 *H.* 5. or if a peer of parliament be convict of a diſſeiſin with force, *H.* 32 *Eliz. B. R. Croke, n.* 9. Lord *Stafford*'s caſe *(i)*, or denies his deed, and it be found againſt him, *M.* 38 & 39 *Eliz. B. R.* [200] *Croke, n.* 26. the earl of *Lincoln*'s caſe *(k)*, a *capias pro fine* an *exigent* ſhall iſſue, for the king is to have a fine, and the ſame reaſon is upon an indictment of treſpaſs or riot, and much more in the caſe of felony.

(i) Cro. Eliz. 170. *(k) Cro. Eliz.* 503.

In an appeal by writ againſt principal and acceſſary, becauſe the writ is general and diſtinguiſheth not which is principal and which acceſſary, the proceſs by *capias* ſhall go againſt them all; but if the defendants make default, the plaintiff in the appeal ought to declare which is principal and which acceſſary before the *exigent* iſſues, and then the *exigent* ſhall go only againſt the principal, and if he diſtinguiſheth it not, but prays an *exigent* againſt all, he is concluded to charge any as acceſſary.

But in an appeal by bill or an indictment, the bill or indictment declares which is principal and which acceſſary, and there indeed the proceſs by *capias* is againſt them all, but when it comes to the *exigent*, the *exigent* ſhall iſſue only againſt the principal, and proceſs continue by *capias infinitè* againſt the acceſſary, till the principal be outlawd, and then an *exigent* to iſſue againſt the acceſſary, becauſe *then* the principal is attaint by outlawry; and if the acceſſary appear upon the *capias*, he ſhall be let to bail, and have *idem dies* by bail till the proceſs be determind againſt the principal, and this was the common law, but farther ſettled by the ſtatute of *Weſtm.* 1. *cap.* 14. 2 *Co. Inſtit. p.* 183. and *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 69 & 70.

If *A.* and *B.* be indicted as principals in felony, and *C.* as acceſſary to them both, the *exigent* againſt the acceſſary ſhall ſtay as before, till both be attainted by outlawry or plea. 40 *Aſſiz.* 25. & 7 *H.* 4. 36. *b.* for it is ſaid, if one be acquitted, the acceſſary is diſcharged, becauſe indicted as acceſſary to both, and therefore ſhall not be put to anſwer till both be attaint. 2 *Co. Inſtit.* 183. *Plowd. Com.* 99. *b. dubitatur*; for tho *C.* be acceſſary to both, he might have been in-
[201] dicted as acceſſary to one, becauſe the felonies are in law ſeveral, but if he be indicted as acceſſary to both, he muſt be prov'd ſo. 4 *Co. Rep.* 44. *b. Vauxe*'s caſe. 47. *b. Waite*'s caſe, 2 *Co. Inſtit. ubi ſupra*; but *vide* 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe *contra per totam Curiam.*

Nota the diverſity ſeems to be between an acceſſary to two principals in an appeal, there he ſhall not be convict, if he be only acceſſary to one; but if *A.* and *B.* be indicted as principals, and *C.* be indicted as an acceſſary to both, if he be found acceſſary to one, he ſhall be convicted, becauſe the king's ſuit; *quære* 8 *H.* 5. 6. *b.* 9 *Co. Rep.* 119. *a.* lord *Sanchar*' caſe (*).

(*) *Vide ſupra, Part* I. *p.* 624.

III. As

III. As to writ of *exigi facias*, and the return thereof.

If the defendant render himſelf to the ſheriff before the *quinto exactus*, and appear in court at the return of the *exigent* and plead, and is bailed to attend the trial, and then make default, the inqueſt ſhall not be taken by default in any caſe of felony, either upon an indictment or an appeal, tho it may in other caſes, but a new *capias*, and after *that* an *exigent* ſhall iſſue, and a *capias* againſt the bail. 19 *E.* 3. *Exigent* 10.

If an *exigi facias* be delivered to the ſheriff, and there are but two county-courts before the return, and the ſheriff return the firſt and ſecond *exactus & non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may iſſue a ſpecial *exigi facias* with an *allocato comitatu*, if it be prayed, after the return, and before any new county-day be paſt, but if any county-day be paſt between the laſt of the former county-days and the return, no *exigi facias* ſhall iſſue with an *allocato comitatu*, but an *exigi facias de novo*, for the demand of the party muſt be at five county-courts ſucceſſively held one after another without any county-court intervening, 22 *E.* 3 11. *a.* ſo if after the ſecond *exactus* the offender render himſelf and finds mainpriſe, and at the day of the return makes default, *exigi facias* with an *allocato comitatu* ſhall iſſue, becauſe three county-days intervened, but a new *exigent* and a *capias* againſt the bail, 22 *E.* 3. *ubi ſupra*, and 32 *E.* 3. *Exigent* 14. [202]

And therefore in *London*, where the holding of the huſtings is uncertain, no *exigi facias* ſhall iſſue with an *allocato huſting'*, becauſe the court cannot take notice of the ſet times of holding it, as they may of the times of holding the county-court. 21 *E.* 3. 35. *b.* 17 *E.* 3. 43. *b.* *Exigent* 11. but *vide contrarium* at this day an *allocato huſting'*, *H.* 19 *Jac. B. R. Archer* and *Dalby* (*l*), where it was agreed, that if an *exigent* iſſues in *London*, and they begin in huſting *de placito terræ*, (as they may) they ſhall proceed along at that huſtings to the outlawry, without mingling their huſtings *de communibus placitis*; but if an *allocato huſting'* comes, they ſhall proceed without omitting any huſting.

If the offender appear at the *capias* and pleads to iſſue, and is then let to bail to attend his trial, and then make default, the inqueſt in caſe of felony ſhall never be taken by default, but a *capias ad audien-*

(*l*) *Palm.* 278.

dam juratam ſhall iſſue, and if he be not taken, an *exigent*, *vide* 26 *Aſſ.* 51. *Coron.* 196. and if he appeared upon the *exigent* and then made default, an *exigi facias de novo* ſhall iſſue. 16 *Aſſ.* 13.

But, if upon the *capias* or *exigent* the ſheriff returns *cepi corpus*, and at the day hath not his body, the ſheriff ſhall be puniſhed, but no new *exigent* awarded, becauſe in cuſtody of record. 30 *Aſſiz.* 23. but if the party be returned outlawd, the proceſs thereupon is a *capias utlegatum*.

And that I may ſay is once for all, as well this proceſs of *capias utlegatum* as all other proceſs upon an indictment, and generally all proceſs for the king are with a *non omittas propter aliquam libertatem*.

And therefore, by virtue of theſe proceſſes, the ſheriff may enter into any liberty to execute the ſame.

And if the party be in his own houſe, or in the houſe of any other, if the doors be ſhut, and the ſheriff having given notice of his proceſs demand admittance and the doors be not opened, he may break open the doors and enter to take the offender. 5 *Co. Rep.* 91. *b. Semayne's* caſe, *& libros ibidem.*

[203] Nay farther, if a party outlawd be in a houſe, and the door be refuſed to be opened, the conſtable, or any other perſon in purſuit of the felon, may break open the doors and apprehend a perſon outlawed or indicted of felony.

The return of the outlawry muſt be certain.

It muſt ſhew where the county-court was held, and in what county, therefore *ad comitatum meum* S. *tent. apud* C. and ſays not *in comitatu prædicto* or *in com'* S. is erroneous. 11 *H.* 7. 10. *a. dubitatur.*

The like if it be *ad comitatum meum tentum apud* S. *in com'* Somers', and ſays not *ad comitatum meum* Somers', or *ad comitatum* Somers', without ſaying *ad comitatum meum* Somerſet. *P.* 7. *Jac. B. R.* adjudged, *Whiting*'s caſe *(m)*. 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

And yet in that caſe at the deſire of the king's attorney, in caſe of an outlawry of felony a *certiorari* iſſued to the coroners to certify the truth, and thereupon the return was amended according to a like precedent in the time of *E.* 4. *T.* 3 *Car. B. R. Plum*'s caſe *(n)*.

The ſheriff muſt return the day and year of the king to every *exactus*.

If the day and year of the king be inſerted in the 1, 2, 3 and 5 *exactus*, but omitted in the 4th *exactus*, it is erroneous, and ſhall not be

(m) 2 *R. A.* 3. 802. *pl.* 2. (n) *Palm.* 480. *Latch* 210.

ſupplied

ſupplied by intendment. *M.* 14 *Jac. B. R. Chapman*'s caſe adjudged *(o)*.

So if it be *anno regni dominæ reginæ* without ſaying *Elizabethæ*, or *dominæ Elizabethæ* without ſaying *reginæ*. *P.* 7 *Jac. C. B. Burford*'s caſe *(p)* and *Brandling*'s caſe *(q)*, or *anno regni domini regis Jacobi* without ſaying *regni ſui Angliæ*, for the year of *England* and *Scotland* differ. *H.* 7. *Jac. Pen*'s caſe *(r)*, ſo if there be leſs than a month betweeen the firſt and ſecond *exactus*. *H.* 13 *Jac. B. R. Taverner*'s caſe *(s)*.

Ad huſting tent' apud Guildhall civitatis London without ſaying *de communibus placitis* is erroneous, becauſe they have two huſtings, one *de communibus placitis*, another *de placitis terræ*. [204] 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

So if an *exigent* be againſt *A.* and *B.* and the return is *primo exactis fuerunt & non comparuerunt* without ſaying *nec eorum aliquis comparuit*, it is erroneous. *H.* 13 *Jac. B. R. Taverner*'s caſe adjudged *(t)*, & *ſæpius alibi*.

If there be two coroners in a county, the calling upon the *exigent* may be by one of them, and likewiſe one alone may give the judgment of outlawry. 14 *H.* 4. 34. *b. per Hankf.* 39 *H.* 6. 40. *b.*

But it ſeems the return muſt be by two in miniſterial acts. 14 *H.* 4. 34. *b.* 39 *H.* 6. 40. *b.*

The name of the coroner muſt be ſubſcribed to the judgment of outlawry at the *quinto exactus*. *M.* 9 *Car. B. R. Ethrington*'s caſe upon an outlawry of felony, and it muſt be ſubſcribed alſo by the name of their office *A. B.* and *C. D. coronatores*, unleſs in *London*, where the mayor is coroner. *M.* 13 *Jac. B. R. Earle*'s caſe *(u)*. *P.* 17 *Jac. Croke*, *n.* 11. *Garrard*'s caſe *(x)*.

The ſheriff's name and office muſt alſo be ſubſcribed to the return of the *exigent*, *e. g. A. B. armiger, vicecomes*.

IV. As to the effect of the *exigent* or outlawry in treaſon or felony.

1. As to the *exigent* the very iſſuing of the writ of *exigent* in caſe of treaſon or felony gives to the king or the lord of a franchiſe, to whom that liberty is granted, the forfeiture of all the goods of the party ſo put in *exigent* from the time of the *teſte* of the writ of *exigent*. 41 *Aſſiz.* 13.

(o) 2 *R. A. p.* 803. *pl.* 1.
(p) *Ibid. p.* 802. *pl.* 6.
(q) 2 *R. A. p.* 802. *pl.* 7.
(r) *Ibid. p.* 802. *pl.* 8.
(s) *Ibid. p.* 802. *pl.* 5.
(t) 2 *R. A. p.* 802. *pl.* 1.
(u) *Ibid. p.* 802. *pl.* 3 & 4.
(x) *Cro. Jac.* 531.

And

And therefore, if in an appeal the *exigent* be well awarded, tho the writ of appeal be abated, the forfeiture of the goods by the *exigent* ſtands in force. 43 *E.* 3. 17. *b. Stamf. P. C. Lib.* III. *cap.* 22. *fol.* 184. *b.*

And tho the outlawry be reverſed for error in law or in fact, as if the party were impriſond at the time of the outlawry and after the [205] *exigent*, whereby the outlawry is reverſed, yet the *exigent* being well awarded the forfeiture of the goods ſtands. 19 *E.* 3. *Forfeiture* 19. 30 *H.* 6. *ibid.* 31.

And therefore a ſpecial writ of error lies even upon the award of the *exigent* for the party ſo put in *exigent* or his executors to reverſe the award of the *exigent*, if it were erroneouſly awarded for error in law or error in fact. *M.* 33 & 34 *Eliz. B. R. Marſhe*'s caſe *adjudged*, cited in *Foxley*'s caſe, 5 *Co. Rep.* 111. *a.* but not without reverſal by writ of error. *Ibid.* As if he were in priſon, or beyond the ſea, or had a charter of pardon before the *exigent* awarded, and thereupon the very award of the *exigent* ſhall be reverſed, and the party reſtored to his goods, and ſo it is for matter of law, as if the *exigent* iſſued againſt the acceſſary before the principal attainted. *Stamf. ubi ſupra.*

But the avoiding only of the outlawry avoids not the *exigent* if well awarded, nay altho the party render himſelf after the *exigent* awarded, and plead to the indictment, and is found not guilty, yet the forfeiture by the *exigent* ſtands in force. 22 *Aſſiz.* 81.

Therefore it is neceſſary for a party outlawd in felony to bring his writ of error ſpecially *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ*, for tho the outlawry be reverſed, it doth not reverſe the award of the *exigent.*

But error in the *exigent* is cauſe to reverſe the outlawry, and error in the appeal or indictment, upon which the *exigent* is awarded, is cauſe to reverſe both outlawry and *exigent.*

But without a judgment of reverſal in a writ of error the forfeiture by the *exigent* awarded ſtands, tho the indictment be quaſhed, or the appeal abated, becauſe the king's title being of record muſt be avoided by a record, and ſo are the books of 41 *Aſſiz.* 13. 43 *E.* 3. 17. *b.* to be reconciled, *vide Foxley*'s caſe, *ubi ſupra.*

2. As touching the forfeiture by outlawry. Outlawry of treaſon or felony is a conviction and attainder of the offenſe charged in the indictment.

And

And as the award of the *exigent* gives the forfeiture of the goods, ſo the outlawry gives the forfeiture or loſs of the lands of the party outlawd, *viz.* in caſe of outlawry of treaſon his lands are forfeited to the king, of whomſoever they are held, and in caſe of outlawry of felony to the lord by eſcheat, of whom they are immediately holden.

But it muſt be remembred, that the bare judgment of outlawry by the coroners without the return thereof of record is no attainder, nor gives any eſcheat. *Co. Lit.* §. 197. *fo.* 128. *b.* 28 *Aſſiz.* 49.

But it muſt be returned by the ſheriff with the writ of *exigi facias*, and the return indorſed.

And therefore, if there be a *quinto exactus*, and thereupon *utlegatus eſt per judicium coronatorum*, but no return thereof is made, there lies a writ of *certiorari* to the coroners, 9 *H.* 4. 7. *b.* 36 *H.* 6. 24. *b.* *Dy.* 223. *a.* or to the ſheriff and coroners, *Regiſter* 284. *a.* 38 *E.* 3. 14. *b.* *vide Dy.* 317. *a.* to certify the outlawry into the king's bench, but this is only either to ground a charter of pardon upon it, 9 *H.* 4. 7. *b.* or to amerce the ſheriff, where he returned only a *quarto exactus* when it was *quinto exactus*, 36 *H.* 6. 24. *b.* but of what effect it is otherwiſe, there ſeems diverſity of opinions: I think as followeth.

1. That it doth not diſable the party to bring an action, becauſe in relation to party and party it ſtands as nothing, till returned by the ſheriff. *Mich.* 14 & 15 *Eliz.* *Dy.* 317. *a.* *Puttenham*'s caſe.

2. That conſequently, barely upon ſuch a return of an outlawry upon a *certiorari*, without the writ of *exigent* indorſed and returned together with the *certiorari*, it ſeems no writ of eſcheat lies for the lord; *quære.*

3. But if the writ of *certiorari* be directed to the ſheriff and coroners, and the writ of *exigent* be extant in court, and they return this outlawry, poſſibly this may be a ſufficient warrant to enter it of a record, as a return upon the *exigent*, for the king's advantage, and to iſſue upon it a *capias utlegat'*. 38 *E.* 3. 14. *b.* to have the forfeiture of his goods. 14 & 15 *Eliz.* *Dy.* 317. *a.* *Co. Lit. fol.* 288. *b.* 37 *H.* 6. 17. *a.* *vide Proctor*'s caſe. *P.* 5 *Eliz.* *Dy.* 223. *a.* and *Stanley*'s caſe there cited out of 18 *E.* 4. to this purpoſe. [207]

4. But unleſs the writ is ſome way returned or extant, I think it gives the king no title to land or goods, for the writ of *exigi facias* is

is the warrant of the outlawry, and *that* which gives the coroners their authority in ſuch a caſe to give judgment of outlawry.

And it is not like the caſe, where there was once a writ and return of outlawry, and the record ſince loſt, for that upon circumſtances a jury upon the general iſſue may find a record, tho not ſhewn in evidence; but here the writ was never in truth indorſed nor returned.

5. But if the writ of *certiorari* were directed to the coroners alone, tho it may be a ground to cauſe the ſheriff to mend his return and make it according to the truth, yet the certificate of the coroners will not make a record to intitle the king or lord to any thing without the writ of *exigent* extant, and the return upon it amended by the ſheriff, for without the *exigi facias* and the return of the outlawry upon it, I think there is neither diſability, forfeiture, nor eſcheat, and therefore *P.* 8 *Jac. C. B.* a *certiorari* ſhall not be ſo much as granted to the coroners to remove an outlawry after the parties death. Sir *John Fit*'s caſe.

V. Touching the avoiding of the outlawry, it is to be done either by plea or by writ of *identitate nominis*, or by writ of error.

1. By plea, where the record of the outlawry is not avoided but made good againſt another perſon, as where the outlawry is againſt *J. S. de B.* and the party taken upon it is another perſon of another addition, as *J. S. de C.* or *J. S. junior*, &c. *vide* 19 *H.* 6. 58. *a.* 10 *E.* 4. 16. *a.* 20 *H.* 6. 19. *a.*

2. By writ of *identitate nominis*, *vide F.N.B.* 267. 20 *E.* 3. *Brief* 683. 14 *H.* 4. 27. *a.*

3. By writ of error, for it is a judgment of record and muſt be avoided by record.

The errors aſſignable are either errors in law, whereof before, or errors in fact, which are many, as if the party outlawd were an
[208] infant under fourteen years old in caſe of felony. *Dy.* 104. *b.* 3 *H.* 5. *Utlagarie* 11.

So if he were impriſoned at the time of the outlawry, unleſs being brought to the bar and demanded, if he will appear, and he refuſe it. *M.* 8 *Jac. C. B.* 1 *H.* 7. 13. 21 *E.* 4. 73. *b.*

As touching avoiding of an outlawry of felony, becauſe beyond the ſea. *H.* 15 *Jac. B. R. Carter*'s caſe *(y)*, theſe differences were

(y) 2 *R. A.* 804. *pl.* 2, 3, 4, 5.

agreed

agreed by the court, whereby the differing books are reconciled upon view of divers precedents.

1. If a man having committed a felony goes beyond the ſea voluntarily, or upon his own occaſions, and not in the king's ſervice before any *exigent* awarded, tho after the indictment, and then an *exigent* is awarded, and the offender being beyond the ſea is outlawd for the felony, he may aſſign it for error.

2. But if after the *exigent* awarded upon the indictment of felony, then he goes beyond the ſea voluntarily or upon his own occaſions, and being ſo beyond ſea is outlawd, he ſhall not avoid it by ſuch being beyond ſea, becauſe the *exigent* awarded gives him notice of the proſecution, and by ſuch a means he may avoid his conviction by ſtaying till all the witneſſes are dead.

3. But if *primâ facie* the error in that caſe is well aſſigned, by alleging he was *ultra mare tempore promulgationis utlegariæ*, and if he were in the realm after the *exigent* iſſued, it ſhall come *in* by the plea of the king's attorney to ſhew it.

4. But if he were within the realm at the time of the *exigent* iſſued, and went beyond ſea upon the ſervice of the king or kingdom, and then is outlawd being beyond ſea, this outlawry ſhall be reverſed, and if the party allege generally, that he was *ultra mare tempore promulgationis utlegariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the *exigent* and before the outlawry pronounced upon the king's command or ſervice, and ſhew it ſpecially, and ſo confeſs and avoid the plea.

And it is to be obſerved, that altho the death of the king doth not diſcontinue the indictment, yet the king's death [209] pending the proceſs and before the outlawry diſcontinues the proceſs, and this is not aided by the ſtatute of 1 *E.* 6. *cap.* 7.

Upon a writ of error upon an outlawry in felony, the record of the outlawry *cum omnibus ea tangentibus* is removed into the king's bench, wherein theſe things are obſervable.

1. That the party outlawd muſt render himſelf in cuſtody, and in cuſtody muſt come in perſon to the bar, and when he is demanded what he can ſay, he is in perſon to pray allowance of the writ of error.

2. The

2 The writ being allowd the record is to be removed, namely the indictment, proceſs, and return, and outlawry, he is then to aſſign his errors in perſon, and a day is given to the king's attorney to reply to him, and in the mean time a *ſcire facias* to the lords mediate and immediate is to iſſue returnable at fifteen days *ad audiendum errores.*

3. If any lords do appear, they may plead to the errors; if the ſheriff return there are no lands, *&c.* then the court proceed to examine the errors.

4. The outlawry being reverſed he is put to anſwer the indictment, and may plead to it, and be tried at the king's bench bar, or the record may be remitted into the country, if it were removed into the king's bench by *certiorari*, with a command to the juſtices below to proceed by the ſtatute of 6 *H.* 8. *cap.* 6. *de quo ſupra, p.* 3.

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[210] CHAP. XXVII.

Touching certiorari *out of the king's dominions.*

THO a writ of *certiorari* be not properly or directly a proceſs upon an indictment, yet it has relation to it, and in order to the full underſtanding of the pleas of the crown is neceſſary to be conſidered.

The king's bench is the ſovereign ordinary court of juſtice in cauſes criminal, and therefore may iſſue a *certiorari* unto inferior juſtices to remove indictments or appeals, and that is done for ſeveral ends.

1. Sometimes to conſider and determine the validity of indictments, and to quaſh or affirm them, as there is cauſe.

2. Sometimes to have the priſoner or offender tried either at the bar, or by *niſi prius* before the king's juſtices of the courts of *Weſtminſter.*

3. Sometimes to examine, and affirm or reverſe the proceedings and judgments given by inferior judges, for it was frequent heretofore to have the record removed by *certiorari* firſt, and then a writ of error, *quod coram vobis reſidet*, tho it is now ordinarily done together by writ of error.

4. Sometimes to plead the king's pardon.

5. Some-

5. Sometimes to iſſue proceſs of outlawry againſt the offender in thoſe counties and places where the proceſs of inferior juſtices cannot reach them.

Tho this be uſual to remove records of indictments by *certiorari*, yet the chancellor may deliver an indictment removed before him, or the juſtices of peace, or other commiſſioners of *oyer* and *terminer* or gaol-delivery may deliver indictments taken before them *manibus propriis* without writ, and ſuch a record ſo removed, and a record made of it removes the record.

If there be an indictment to be removed and the party be in cuſtody, it is uſual to have an *habeas corpus* to remove the priſoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, ſo the *habeas corpus* alone removes not the record itſelf, but only the priſoner with the cauſe of his commitment, and therefore altho upon the *habeas corpus* and the return thereof the court can judge of the ſufficiency or inſufficiency of the return and commitment, and bail or diſcharge, or remand the priſoner, as the caſe appears upon the return, yet they cannot on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itſelf be removed by *certiorari*, but the ſame ſtands in the ſame force it did, tho the return ſhould be adjudged inſufficient, and the party diſcharged thereupon of his impriſonment, and the court below may iſſue new proceſs upon the indictment, tho it be otherwiſe in an *habeas corpus* in civil cauſes, for it is a *ſuperſedeas*, and cloſeth up the hands of the inferior court in civil cauſes. [211]

By the ſtatute of 1 & 2 of *P. & M. cap.* 13. an *habeas corpus* or *certiorari* to remove a priſoner or a recogniſance ought to be ſigned with the proper hand of the chief juſtice, or in his abſence by one of the juſtices of the court, out of which it iſſues.

By the ſtatute of 21 *Jac. cap.* 8. all *certiorari*'s to remove indictments before juſtices of the peace, ſhall be deliverd at the quarter-ſeſſions in open court, and the party indicted ſhall become bound with ſufficient ſureties in ten pounds to the proſecutor, with condition to pay him ſuch charges as the juſtices of peace ſhall aſſeſs, if the party be convicted, otherwiſe the juſtices of peace may proceed to trial notwithſtanding ſuch *certiorari*.

A *certiorari* may iſſue to the juſtices of a county palatine, or to the mayor of the *cinque ports* to remove an indictment taken before them,

and

and muſt not be directed to the chancellor of *Durham*, *&c.* or warden of the *cinque ports*, for now by the ſtatute of 27 *H.* 8. *cap.* 24. all commiſſions of the peace, gaol-delivery, *oyer* and *terminer*, *&c.* are to be made in the king's name, and theſe juſtices in criminal [212] cauſes are immediately ſubject to this court, as other juſtices of like nature elſewhere are; and if they return a privilege of the county palatine or *cinque ports* upon the *certiorari*, it ſhall not be allowed, but an *aliàs certiorari* ſhall iſſue with a precept to produce their charters, by which they claim ſuch exemption, *P.* 43 *Eliz. B. R. Rot.* 119. *T.* 8 *Car. B. R. (a)*, and *M.* 8 *Car. B. R. (b)* upon an indictment of ſodomy in the *cinque ports*. *T.* 1653. *Rutabie*'s caſe upon an indictment of murder in *Durham (c)*.

A *certiorari* iſſues bearing *teſte* the laſt day of *Trinity term* to remove all indictments againſt *A.* and *B.* returnable *tres Michaelis*; at the quarter-ſeſſions it is deliverd, and then an indictment is found againſt *A. B.* and *C.*

Ruled 1. That tho the delivery of a *certiorari* ſuperſedes the proceeding upon an indictment, yet it doth not hinder the taking of an indictment after the delivery of the writ.

2. Altho the indictment be taken after the *teſte* of the *certiorari*, and before or after the delivery thereof, yet all ſuch indictments againſt *A.* and *B.* ought to be removed, and the juſtices below cannot proceed upon ſuch indictments to trial, judgment, or execution; and if they do, it makes their proceedings erroneous and void, and likewiſe ſubjects the juſtices to an attachment for the contempt, whether they proceed at the ſame ſeſſions, or a private ſeſſions after.

3. That ſuch a *certiorari* to remove all indictments againſt *A.* and *B.* removes all indictments wherein *A.* or *B.* are indicted either alone or together with any other perſon. *M.* 22 *Car.* 1. *B. R. Orfener*'s caſe *(d)* adjudged. 1 *R.* 3. 4. *b.* 6 *H.* 7. 16. *a.*

If *A. B.* and *C.* are indicted (ſuppoſe for a battery), ruled, 1. Tho *A.* alone tenders ſecurity for the coſts, it is ſufficient within the ſtatute, and the record ought to be removed into the king's bench. 2. If the indictment be at a private ſeſſions, this indictment ought to be deliverd into the quarter-ſeſſions, yet the delivery of the *certiorari* a

(a) Hopſtil Tilden's caſe, 1 *R. A.* 395. *pl.* 6.
(b) Dugdale's caſe. *ibid.*
(c) Vide ſupra, Part I. *p.* 467. and alſo *Simpſon*'s caſe, 1 *R. A.* 395. *pl.* 5.
(d) The ſame points reſolved in *Cheney*'s caſe, 1 *R. A.* 395. *pl.* 1, 2.

the

the private ſeſſions cloſeth the hands of the juſtices, altho the allowance of the writ and the tender of the ſecurity muſt be by the ſtatute at the quarter-ſeſſions. *M.* 1653. *B. R.* adjudged.

Nota, *T.* 15 *Car.* 1. *B. R.* in *Hancock*'s caſe theſe points were reſolved. 1. That if many are indicted, and one only tenders ſureties for the coſts upon the ſtatute of 21 *Jac.* it is ſufficient.

2. If the ſurety be ſufficient as to 10*l.* that is a ſufficient ſurety, and ought to be allowed by the juſtices of peace.

3. A *feme covert* is not within the ſtatute of 21 *Jac.* to find ſureties.

4. If a *certiorari* iſſue and ought to be allowd, the proceeding of the juſtices after is *coram non judice.*

5. It was reſolved *M.* 4. *Car.* that the removal of an indictment of forceable entry by the proſecutor is not within the ſtatute of 21 *Jac.*

And ſo *note* a difference between a writ of error and a *certiorari*, the former is a *ſuperſedeas* to the iſſuing of execution from the time of the delivery of the writ till the day of the return be paſt, but then if the plaintiff proceed not to the removal of the record, execution ſhall be granted for his delay; but a *certiorari* is a *ſuperſedeas* from the time of the delivery thereof for ever, unleſs a *procedendo* iſſue. 21 *H.* 6. 28. *b.* *Dy.* 245. *a.*

If at the ſeſſions of the peace an indictment of forceable entry be, and reſtitution be awarded, and after the ſeſſions and before reſtitution actually made a *certiorari* is delivered to one juſtice of peace, before the ſtatute of 21 *Jac.* it cloſed up their hands, and no reſtitution ſhall be awarded, but the juſtice ought to make a *ſuperſedeas* thereupon.

And it ſeems the ſame law ſtill remains at this day upon indictments of forceable entry found at private ſeſſions, becauſe the juſtices make execution thereupon before any quarter-ſeſſions come by virtue of the ſtatute of 8 *H.* 6. *cap.* 9. and if the *certiorari* ſhould not be obeyed, it would be fruitleſs.

If *A. B. C.* and *D.* be actually indicted in one indictment for one offenſe, and a *certiorari* be to remove all indictments againſt *A.* and *B.* this will be ſufficient to remove the indictment againſt *A.* and *B.* and alſo it removes the indictment as to *C.* and *D.* for the juſtices may deliver the indictment *per manus proprius.* *M.* 37 & 38 *Eliz. B. R. Woodward*'s caſe, *contra* 6 *E.* 4. 5. *a.* [214]

But if the indictment be but one, but the offenſes ſeveral, as if *A. B. C.* and *D.* be indicted by one bill for keeping ſeveral diſorderly houſes, a *certiorari* to remove this indictment againſt *A.* and *B.* re-

moves not the indictment as to *C.* and *D.* for tho they are all compriſed in one bill, yet they are ſeveral indictments and ſeveral offenſes, and ſo the record is in the king's bench virtually and truly as to *A.* and *B.* but as to *C.* and *D.* the record remains below.

But if the juſtices *per manus ſuas proprias* deliver the bill into court againſt all of them as they may, then if a record be made of that delivery, the indictment is entirely removed againſt *A. B. C.* and *D.* becauſe not done upon the writ of *certiorari*, but *per manus ſuas proprias*: But otherwiſe it is, where the offenſes are ſeveral, and the indictment againſt *A.* and *B.* is removed by writ, and by a return indorſed upon the writ, for then that ſingle indictment, that concerns *A.* and *B.* is removed, and not the others, where the offenſes are ſeveral, and ſeverally charged.

But as I ſaid, if there be one indictment againſt *A. B. C.* and *D.* for one murder or burglary, another againſt the ſame perſons for robbery, and a third againſt the ſame perſons for a rape, a *certiorari* to remove all indictments againſt *A.* and *B.* removes all theſe ſeveral indictments againſt *A. B. C.* and *D.* for tho in law each of them be ſeverally a felon, yet inaſmuch as they are jointly charged they ſhall be all removed as to *A. B. C.* and *D.* by virtue of this one writ, contrary to the opinion of *Markham.* 6 *E.* 4. 5. *a.*

And yet in ſome caſes variance between the *certiorari* and the record cauſeth the record not to be removed, as if the *certiorari* be to remove the record of an inquiſition *in curiâ noſtrâ*, whereas it was *in curiâ* of the predeceſſor, the record is not removed. 3 *Eliz. Dy.* 206. *b.*

[215] So if it be to remove an indictment for ſtealing of two horſes, and the record is but for one. 3 *Aſſiz.* 3. *Plowd. Com.* 393. *a.*

If a *certiorari* iſſue, it is a *ſuperſedeas* in law, and it makes judicial proceedings after the *certiorari* delivered erroneous, but poſſibly it makes miniſterial proceedings, as the award of reſtitution in a forceable entry, void alſo; *vide* 6 *H.* 7. 16 *a. per Keble*, altho it doth not remove the record before the return. *Dy.* 245. *a.*

After a *certiorari* iſſued and delivered, and before the record removed the inferior judge may be enabled to proceed by a *procedendo* or *ſuperſedeas* of the *certiorari* iſſuing out of the court of king's bench.

But if the record be removed and filed in court, at common law no *procedendo* could be granted, neither could the record be remitted, but now by the ſtatute of 6 *H.* 8. *cap.* 6. the court of king's bench may remand

remand the record, and command the judges below to proceed upon the indictment ſo remitted.

And *note* the difference between a *certiorari* in the king's bench and chancery: In the king's bench the very record itſelf is removed, and that which remains in the court below is but a ſcroll. But uſually in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record, and therefore if the tenor of a record of an indictment, or attainder, or conviction be removed by *certiorari* into the chancery, and thence ſent by *mittimus* into the king's bench, they cannot thereupon proceed either to judgment or execution, becauſe they have only the tenor of the record before them, and not the record itſelf, as in the former caſe. *Vide* 37 *H.* 6. 17. 39 *H.* 6. 4. *Dy.* 217. *a.* 2 *E.* 3. 21. *a.* (*e*).

(*e*) *Vide Dyer* 369. *b.*

Burn. Tit. Certiorari. 4. Blackſ. Com. ch. 19. p. 262. 263. 272. ch. 24. pa. 320, 321. Index to 2 Hawk. P. C. Tit. Certiorari. See the ſeveral Index's of 1, 2, 3, & 4. Reports of Sir James Borrow, & Rep. tempt. Lord Hardwicke 396.

CHAP. XXVIII. [216]

Touching the arraignment of offenders *in capital offenſes.*

IN the former chapter I have ſhewed how the priſoner is to be accuſed, namely, by indictment, and how to be brought in by proceſs to his anſwer, and how to be dealt with, if he make default, or ſtand out againſt the proceſs of law

I am now to conſider how he is to be proceeded againſt, if he be taken, or render himſelf, and appear in court.

For in caſe of an indictment of treaſon or felony no offender can appear by attorney, but in perſon, tho in ſome caſes of other indictments after plea pleaded, the defendant may appear by attorney. 9 *E.* 4 4. *a.* 22 *Aſſiz.* 73. *B. Attorney* 63.

When the offender in treaſon or felony comes into court, or is brought in by proceſs, ſometimes of *capias*, and ſometimes of *habeas corpus* directed to the gaoler of another priſon, the firſt thing that follows thereupon, is his arraingment.

And herein I will conſider, 1. What the arraingment of a priſoner or malefactor is. 2. How it is perſormed, and in what manner. 3. When it is to be done.

I. Arraignment therefore is nothing elſe but the calling of the offender to the bar of the court to anſwer the matter charged upon him by indictment or appeal.

And the word in *Latin* is no other than *ad rationem ponere*, and in *French ad reſon*, or abbreviated *a reſn*, for as the *vox forenſis diſrain* or *derayn* uſed antiently in our books *de ceo tend ſuit & derayne* imports in *Latin diſrationare* to diſprove or evince the contrary of any thing, that is or may be affirmed, ſee *Spelman's Gloſſ.* tit. *Dirationare*, *and Selden's* notes upon *Forteſcue*, *cap.* 21. *p.* 23. ſo *arraigne* is *ad rationem ponere* to call to account or anſwer.

[217]

And this appears to be the true ſenſe and etymology of the word, by the excellent record of the reverſal in parliament of the judgment given againſt the *Mortimers*, *E.* 2. the reverſal and whole record is entered *verbatim Patents* 1 *E.* 3. *part* 2. *m.* 3. where there are three errors aſſigned in that arbitrary judgment, and all ruled in parliament to be errors, and the attainder reverſed. 1. *Quòd cum aliquis de regno regis tempore pacis deliquerit erga dominum regem vel alium, per quod debeat vitam vel membrum perdere, & ſuper hoc coram judicibus in judicium ductus fuerit, primò debeat poni rationi & ſuper delicto ſibi impoſito reſponſiones ipſius audiri, priùs quam procedatur ad judicium de eo; ſed in recordis & proceſſibus prædictis continetur, quòd prædicti* Rogerus & Rogerus *coràm juſtic' ducti adjudicati fuerunt judicio tractûs & ſuſpendii, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque hoc, quòd ipſi fuiſſent inde arrenati, ſeu quòd ipſi ad aliqua eis impoſita reſpondere poſſint, quod eſt contra legem & conſuetudinem regni, &c. per quod ad judicium de eis erronicè proceſſum eſt.*

2. *Dicit etiam quòd in recordis & proceſſibus prædictis continetur, quòd dominus rex recordabatur verſus ipſos* Rogerum & Rogerum, *quòd ipſi hoſtiliter equitaverunt cum* Humfredo de Bohun *nuper com'* Heref. *& aliis inimicis domini regis contra ipſum regem & populum regni ſui diverſa mala & facinora perpetrando, quare judicia prædicta ſuper eiſdem reddita fuerunt, cujuſmodi recorda non eſt domino regi facere, niſi de inimicis ſuis tempore guerræ, & hoc, viz. quando idem dominus rex equitat cum vexillis explicatis, & non tempore pacis, ſed eo tempore dominus rex non equitavit cum vexillis explicatis, nec fuit tempore guerræ, cancellario domini regis & juſticiariis placearum de utroque banco ſedentibus*

bus ad juſtitiam unicuique conqueri volenti & proſquenti faciend', per quod ad judiciam de eis, ut prædictum eſt erronicè proceſſum eſt. 3. *Dicit etiam quòd erratum eſt in hoc, quòd, cum in Magna Charta de libertatibus* Angliæ *continetur, quod nullus liber homo capiatur, aut impriſonetur, aut de libero tenemento ſuo diſſeiſietur, vel de libertatibus vel liberis conſuetudinibus ſuis, aut utlegatur, aut exulet, aut aliquo modo deſtruatur, nec dominus rex ſuper eum ibit, nec ſuper eum* [218] *mittet, niſi per legale judicium parium ſuorum vel per legem terræ, ſed in recordis & proceſſibus prædictis continetur, quòd prædicti* Rogerus & Rogerus *ſigillatim judicio tractûs & ſuſpendii adjudicati fuerunt, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque legali judicio parium ſuorum ad hoc vocatorum, & contra legem terræ.* And thereupon judgment of reverſal is given in theſe words, *Et quia inſpectis recordis & proceſſibus prædictis compertum eſt in eiſdem, quòd prædicti* Rogerus Mortimer & Rogerus Mortimer *coram juſtic' ducti judicio tractûs & ſuſpendii adjudicati fuerunt, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque hoc, quòd ipſi ad aliqua eis vel eorum alteri impoſita poſſint reſpondere, & hoc tempore pacis, & abſque hoc, quod dominus rex equitavit cum vexillis explicatis, & cancellario domini regis & juſtic' de utroque banco ſedentibus, ut prædictum eſt, & abſque legali judicio parium ſuorum, quod eſt contra legem & conſuetudinem regni* Angliæ *& tenorem Chartæ prædictæ, conſideratum eſt per dominum regem nunc & ejus concilium in pleno parliamento, quod omnia judicia prædicta ob defectus & errores prædictos & alios in recordis & proceſſibus prædictis compertos revocentur, &c.*

I have tranſcribed the record more at large, becauſe there are many uſeful parts in it, ſome whereof will be uſeful to other purpoſes.

But as to the buſineſs in queſtion, theſe two things are obſerveable. 1. What arraigment is, namely, it is *ad rationem ponere*, for that which in one part of the record is *arrenatus*, is before rendered *rationi ponere*, to be put to anſwer; and therefore *Spelman*, who is ſeldom miſtaken, is yet herein miſtaken, both in the nature, orthography, and etymology of the word, which he ſaith is *arraiare* or *adrhamire*, for it is nothing ſo. 2. Of what importance, and how eſſential it is, that in capital offenſes the offender being in court ſhould be arrainged or put to anſwer; the want whereof rendered the judgment given againſt the *Mortimers* erroneous, and reverſed by the king and his parliament.

The arraignment of a priſoner, therefore, conſiſts of theſe parts:

1. The calling the priſoner to the bar by his name, commanding him to hold up his hand, which tho it may ſeem a trifling circumſtance, yet it is of importance, for by holding up his hand *conſtat de perſonâ indictati* and he owns himſelf to be of that name *(a)*.

2. Reading the indictment diſtinctly to him in *Engliſh*, that he may underſtand his charge.

3. Demanding of him whether he be guilty or not guilty; and if he pleads *not guilty*, the clerk joins iſſue with him *cul. priſt*, and enters the priſoner's plea; then he demands how he will be tried, the common anſwer is, *by God and the country*, and thereupon the clerk enters *po. ſe*, and prays to God to ſend him a good deliverance.

But if the priſoner hath any matter to plead either in abatement, or in bar of the indictment, as *miſnomer*, *auterfoits acquit*, *auterfoits convict*, a pardon, &c. then he pleads it without immediate anſwering to the felony: but in ſome caſes *ſi trove ne ſoit*, then to the felony *not guilty*, *de quo poſtea*. And thus far what the arraignment is.

II. How to be done or performed.

On the part of the court, what is to be done is ſhewn before, but in relation to the priſoner and his coming to the bar.

The priſoner, tho under an indictment of the higheſt crime, muſt be brought to the bar without irons, and all manner of ſhackles or bonds. *Stamf. P. C. fol.* 78. *a.* 2 *Co. Inſt.* 316. *Co. P. C. p.* 34, 35. *Bract. Lib.* III. *fol.* 137. *a. & alios libros ibi*, unleſs there be a danger of eſcape, and then they may be brought with irons.

But *note*, at this day they uſually come with their ſhackles upon their legs, for fear of an eſcape, but ſtand at the bar unbound, till they receive judgment *(b)*

[220] III. When the party is to be arraigned.

In caſe of murder at the common law, the judges did uſually forbear to arraign the priſoner upon an indictment till the year and day were paſt, whether an appeal were depending or not *per omnes juſtic'* Angliæ, 22 *E.* 4. *Coron.* 44. unleſs the evidence were very clear

(a) The ceremony of holding up the hand is not required in the caſe of a peer, nor is it of abſolute neceſſity in the caſe of a common perſon, it being ſufficient that it appears to the court who is the perſon indicted. See lord *Delamere's* caſe, *State Tr. Vol.* IV. *p.* 211. and lord *Mohun's* caſe, *State Tr. Vol.* IV. *p.* 508.

(b) By this it appears to have been our author's opinion, that upon whatever occaſion a priſoner be brought into court, he ought not to ſtand there *in vinculis* till after his conviction, when he comes to receive judgment, nor even at the time of his arraignment, (for that is the time our author is here diſcourſing of), yet in *Layer's* caſe, *Mich.* 9 *Geo.* 1. *B. R.* a difference was taken between the time of arraignment, and the time of trial; and accordingly the priſoner in that caſe ſtood at the bar in chains during his arraignment. See *State Tr. Vol.* VI. *p.* 230, 231.

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to convict him, and no appeal depending: or altho an appeal were depending, if the appellant were an infant. 21 *E.* 3. 23. *b. Stamf. P. C fol.* 107. *a.* becauſe of the delay.

But now by the ſtatute of 3 *H.* 7. *cap.* 1. the juſtices ſhall proceed to try him upon an indictment of murder (or manſlaughter) tho within the year, and if acquitted, yet he ſhall not be diſcharged, but at the diſcretion of the juſtices ſhall be continued in cuſtody, or upon bail, till the year and day be paſt.

So that by this ſtatute *auterfoits acquit* of principal or acceſſary, or *auterfoits attaint* of the principal upon an indictment is no bar to an appeal, but *auterfoits acquit* upon an appeal remains a bar to an indictment for the ſame offence.

But *auterfoits convict* upon an indictment, and having had his clergy, is a good bar to an appeal notwithſtanding this ſtatute, *de quo infra*; and yet in favour of an appeal, if a man be indicted of murder, and plead to it, and be convict, if the wife enter an appeal for the ſame death againſt the priſoner, as long as that appeal is depending, judgment ſhall be reſpited; but if the wife be nonſuit in her appeal, then judgment ſhall be given upon the conviction. *Vide M.* 12 & 13 *Eliz. B. R. Dy.* 296. *a. Stanley*'s caſe.

But as to other indictments, as of robbery, *&c.* the ſame remain at common law, as before this ſtatute, yet it is the conſtant courſe, unleſs an appeal be depending, to arraign the priſoner upon an indictment within the year; for now by the ſtatute of 21 *H.* 8. *cap.* 11. the party robbed hath as effectual reſtitution of his goods upon his proſecution of an indictment, as upon an appeal; and ſo an appeal of robbery is rarely brought. [221]

Nay, tho an appeal of robbery be brought by writ, the juſtices will not ſtay the arraignment of the priſoner upon the indictment, unleſs it be by bill, or that the plaintiff in an appeal by writ hath declared upon the writ, becauſe the writ is general, and it cannot appear what the goods are till declaration; but in an appeal of death by writ the perſon killed is certain, 31 *H.* 6. 11. *a. Stamf. P. C. Lib.* II. *cap.* 36. *fol.* 107. *a.*

If a man be indicted and appealed before the ſame juſtices for the ſame murder or other felony, the party ſhall be arraigned upon the appeal firſt, and not upon the indictment, in favour of the appellant, as I have ſaid; but if the appellant be nonſuit upon his appeal, the priſoner

ſoner ſhall be arraigned upon the appeal *(c)*, and proceſs ſhall ceaſe upon the indictment. 4 *E.* 4. 10. *a.* And it ſhall be entered *ceſſet proceſſus* upon the indictment, 4 *E.* 4. 10. *a.* And if the priſoner plead, and be acquitted, or plead the king's pardon, and it be allowed, regularly the acquittal or pardon, and the allowance thereof ſhall be entered upon the appeal, tho it be ſafe to enter it likewiſe upon the indictment; and therefore if in that caſe, thro the miſtake of the clerk, there be no entry of *ceſſet proceſſus* upon the indictment, and the indictment lying thus open, there be proceſs of outlawry made upon the indictment, and the party be outlawed, he hath no remedy but to bring a writ of error upon the outlawry, and he may aſſign for error his acquittal upon the appeal, and aver it to be the ſame felony, and upon confeſſion of the king's attorney, it ſhall be reverſt. 4 *E.* 4. 10. *a.*

If there be an inquiſition before the coroner of murder, and returned, and likewiſe an indictment for the ſame offenſe by the grand inqueſt, it is uſual to arraign the priſoner upon the indictment, but he may be arraigned upon both at the ſame time; but if arraigned upon the indictment only, there ought to be an entry of *ceſſet proceſſus* upon the coroner's inqueſt as to the priſoner, who may otherwiſe be outlawd upon it.

[222] If a priſoner be found guilty of murder by the coroner's inqueſt, and a bill of indictment of murder be againſt him at the ſeſſions of gaol-delivery for the ſame murder, it is uſual to arraign him upon the coroner's inqueſt, and not upon the indictment, and if he be acquit upon that, then to arraign him upon the bill, and put him to his plea of *auterfoits acquit.*

But to avoid the trouble of a double arraignment and plea, I have obſerved this courſe.

1. If one indictment be of manſlaughter, and the other of murder, then to arraign him of that offenſe, which is higheſt, and ſpare the other.

2. If both be of murder, but one is inſufficient, as for the moſt part coroners inqueſts are, then to arraign him upon the good indictment, and quaſh the other.

3. If both preſentment and indictment be of the ſame nature, and both (for inſtance) of murder, and both good, and both returned into court the ſame ſeſſions, I have uſually arraigned the priſoner upon both (ſo as they be put upon the ſame inqueſt to be tried), to avoid

(c) At the ſuit of the king.

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the trouble of the plea of *auterfoits acquit* or *attaint*, and to indorſe his acquittal or attainder upon both preſentments, always directing the jury to acquit him upon both, if acquitted upon one, and *e converſo*.

Now concerning the arraignment of the acceſſary; regularly the acceſſary ſhall not be arraigned, nor put to anſwer till the principal be attaint by outlawry or confeſſion, or be convict, and attaint alſo by judgment upon verdict; for it is an offenſe dependant upon the principal; and altho the principal be convict, yet if he have his clergy, the acceſſary is diſcharged thereby, and ſhall not be arraigned. 2 *Co. Inſt.* 183. *ſuper ſtat. Weſtm'* 1. *cap.* 14.

But yet the principal and acceſſary being indicted by one or ſeveral indictments, and both appearing, may be arraigned together at the ſame time *(d)*, and both pleading not guilty, the ſame jury ſhall be charged with both, and directed to inquire of both, [223] *viz.* firſt of the principal, and if they find him guilty, then to enquire of the acceſſary. 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe. 2 *Co. Inſt.* 184. *ſuper ſtat. Weſtm'* 1. *cap.* 14.

But if *A.* and *B.* be indicted for murder, *A.* as giving the ſtroke, and *B.* as being preſent, aiding, and abetting, if *A.* flies, and *B.* is apprehended, *B.* may be arraigned and tried before *A.* be attainted by outlawry, tho he be principal but in the ſecond degree, for they are both principals; and ſo it was done in the caſe of *Thady*, *H.* 25 & 26 *Car.* 2. tho in point of diſcretion it is good to try them both together.

If *A.* be indicted of high treaſon, and *B.* be indicted for receiving or comforting him, or procuring, or abetting (but not preſent), here it is true they are all principals; but in as much as *B.* in caſe of a felony would have been but acceſſary, and it is poſſible that *A.* may be acquitted of the fact, it ſeems to me, that *B.* ſhall not be put to anſwer of the receipt or procurement till *A.* be outlawd, or at leaſt jointly with *A.* *(e)*, and in this caſe the ſame jury may be charged with both, and their charge ſhall be firſt to inquire whether *A.* were guilty, and if not, then to acquit both *A.* and *B.* and if *A.* be found guilty, then that they inquire of *B.* And in *Somervill*'s caſe, 26 *Eliz.* *(f)*, mentiond before, the inquiry was firſt of the principal offender, and then of the receiver or procurer to avoid that inconveni-

(d) They *may be*, but not *neceſſarily muſt*, as was laid down for law by C. J. *Pemberton* in the trial of Count *Coningſmark*. See *State Tr. Vol.* III. *p.* 465. and Sir *John Hawle*'s remarks thereon, *State Tr. Vol.* IV. *p.* 199.

(e) Yet in lady *Liſle*'s caſe, *State Tr. Vol.* IV. *p.* 105. it was without any foundation in law practiſed quite contrary. *Vide ſupra*, *Part.* I. *p.* 238. *in notis.*

(f) 1 *And* 109.

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ence and *awerouſt*, that might happen in caſe *B.* were firſt convict of the procurement and receipt, and yet poſſibly *A.* might be acquitted of the principal fact.

If the principal do not plead *not guilty*, but ſome other plea, as in abatement, or in bar, the acceſſary ſhall not be put to plead till the plea of the principal be determind. 9 *H.* 7. 19. *b.* but if the principal plead *not guilty*, then the acceſſary, if preſent, ſhall be put to plead preſently, and they may be tried by the ſame inqueſt, *ut ſupra.*

[224] In antient time, if the principal made default, and appeard not, the acceſſary was not put to anſwer. 44 *E.* 3. 7. *b. Coron.* 216. But of later times the acceſſary, if he appear, hath been arraigned and put to plead, but proceſs againſt the inqueſt, and trial ceaſeth till the principal come in or be attaint by outlawry. 9 *H.* 4. 2. *a.* 7 *H.* 4. 36. *a. Stamf. P. C. Lib.* I *cap.* 49. *fol.* 46. *a.*

But the acceſſary may pray proceſs againſt the principal, *& renuntiari juri pro ſe introductio*, and his conſent makes it not error, 8 *H.* 5. 6. *b. Coron.* 463. and therefore, if the acceſſary be acquitted before the principal tried, it is agreed, that it is a good acquittal, and by the ſame reaſon, if he were convict, it is a good conviction, yet no judgment ſhall be given againſt him upon that conviction till the principal tried.

And upon this reaſon it is, that if *A.* be arreſted or in priſon for felony, and *B.* reſcue him, or the gaoler ſuffers him voluntarily to eſcape, tho this be a diſtinct felony in *B.* the reſcuer, and in the gaoler that voluntarily ſuffers him to eſcape, for which they may be preſently indicted, yet they ſhall not be arraigned or put to anſwer till *A.* be convicted and attainted by judgment, or outlawd. 1 *H.* 7. 6. *a.* 1 *E.* 3. 16. *b.* 2 *Co. Inſtit.* 592. *ſuper ſtat. de frangentibus priſonam*; for if *A.* be acquitted upon the indictment, the reſcuer or gaoler ſhall be diſcharged.

But if *A.* be indicted of the felony, or not indicted, and be lawfully impriſond and break the priſon, he may be indicted and arraigned for his felony in breaking the priſon, before his conviction of the felony for which he was committed. 2 *Co. Inſtit. ubi ſupra.*

And yet, if after that indictment *A.* be arraigned of the principal felony, and acquitted, he may plead that acquittal of the principal felony in bar to the indictment for the breach of priſon; *vide rationem ſupra, Part* I. *cap.* 54. *p.* 611.

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If a *capias* be awarded againſt a felon, and he render himſelf and plead not guilty, and is let to bail, and then makes default, a *capias ad audiendam juratam* ſhall iſſue; and if he be brought in, he ſhall be brought in upon his plea, but it is ſaid by *Scot*, that if he had rendred himſelf upon the *exigent*, and pleaded not guilty, and been let to bail till the trial, and then made default, [225] whereupon an *exigent* is awarded, and the felon is brought in upon the *exigent*, he ſhall plead *de novo*, and conſequently be arraigned *de novo*, for by the *exigent* awarded, the firſt iſſue is diſcontinued. 16 *Aſſiz.* 13.

See 4 Blackſ. Com. ch. 25. Of arraignment and its incidents, Burn. Tit. Arraignment and Index to 2 Hawk. P. C. tit. Arraignment.

CHAP. XXIX.

Concerning the plea of the priſoner *upon his arraignment, and firſt* of his confeſſion *of the fact charged*, and approving *others*.

WHEN the priſoner is arraigned, and demanded what he ſaith to the indictment, either he confeſſeth the indictment, or pleads to it, or ſtands mute, and will not anſwer.

The confeſſion is either ſimple, or relative in order to the attainment of ſome other advantage.

That which I call a ſimple confeſſion is, where the defendant upon hearing of his indictment without any other reſpect confeſſeth it, this is a conviction; but it is uſual for the court, eſpecially if it be out of clergy, to adviſe the party to plead and put himſelf upon his trial, and not preſently to record his confeſſion, but to admit him to plead. 27 *Aſſiz.* 40.

If it be but an extrajudicial confeſſion, tho it be in court, as where the priſoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus ſhewn it appear to be felony, the court will not record his confeſſion, but admit him to plead to the felony *not guilty*. 22 *Aſſiz.* 71. *Stamf. P. C. Lib.* II. *cap.* 51. *fol.* 142. *b.* [226]

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A confeſſion in order to ſome other advantage, is either where the priſoner confeſſeth the felony in order to his clergy, *de quo infra, cap.* 44. or where he confeſſeth the offenſe, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvement, which I ſhall here open in the order that Mr. *Stamford* hath gone before me.

1. Of what offenſes a man may be an approver. 2. In what ſuits. 3. At what time. 4. Before whom. 5. In what manner. 6. How he ſhall be orderd before and after his appeal. 7. What proceſs ſhall iſſue againſt the party appeald. 8. What pleas he ſhall have, and how tried. 9. How proceeded in. 10. What judgment ſhall be given for or againſt the appellor or appellee.

Before I come to theſe particulars, we are to know, that it is purely in the diſcretion of the court to admit the approver to appeal or not, or to give him any reſpite from judgment or execution upon his confeſſion and approvement; for otherwiſe it would be in the power of any party arraigned for felony by becoming an approver to delay judgment, where (it may be) his appeal is but feigned, for the admiſſion of his appeal or reſpite of judgment is but a matter of grace and diſcretion. 21 *H.* 6. 34. *b. Coron.* 66 & 67. *per omnes juſtic' utriuſque banci. Co. P. C. cap.* 56. *p.* 129.

And therefore this courſe of admitting of approvers hath been long diſuſed, and the truth is, that more miſchief hath come to good men by theſe kind of approvements by falſe accuſations of deſperate villains, than benefit to the public by the diſcovery and convicting of real offenders, gaolers for their own profits often conſtraining priſoners to appeal honeſt men, and therefore proviſion made againſt it by 1 *E.* 3. *cap.* 7.

And upon this reaſon it is, that as of later times the admiſſion of ſuch appeals hath been wholly diſuſed, ſo in times when they were admitted, a great ſtrictneſs was held upon ſuch appeals, as will appear upon the examination of the enſuing particulars. [227]

I. Therefore touching the offenſes, whereof an approvement may be.

It may be only of capital offenſes, as of treaſon or felony, whether they be at common law, or by act of parliament.

When a priſoner is admitted to be an approver, he is ſworn in court to approve, or rather to diſcover all felonies and treaſons that he knows,

knows, and a certain time prefixt (as three or four days), to make his appeal, and a coroner aſſigned to him to receive ſuch his appeal and diſcovery. 12 *E.* 4. 10. *b.*

And yet the appeal is not good as an appeal, or as an approvement to compel the parties appealed to anſwer, but only as to ſuch felonies or treaſons that were committed by the appellee together with the appellor, and whereof the appellor ſtands indicted in court, and as to other treaſons or felonies, [than] whereof the appellor ſo ſtands indicted, it is no legal appeal or approvement to put the appellee to anſwer.

And therefore if *A.* being indicted for robbing of *B.* and he appeal *C.* that he robbed *A.* himſelf, this is a void appeal, and the appellor ſhall be executed, and the appellee ſhall not be put to anſwer to it. 25 *E.* 3. 39. *(a)*.

So if he appeal *C.* as acceſſary to the robbery of *B.* either before or after, *C.* ſhall not be put to anſwer, for it is not the ſame felony charged upon *A.* but only an acceſſary to it. 10 *E.* 4. 14. *a.*

So if *A.* be indicted of felony, and he appeal *B.* of treaſon, *B.* ſhall not be put to anſwer that appeal; but *B.* being ſo accuſed, it may be a ground for the juſtices in point of diſcretion to make *B.* find ſureties for his appearance at the next ſeſſions, or in the king's bench, and in the mean time to be of good behaviour towards the king and his people, as was done when a perſon that had abjured for felony, made ſuch an appeal of treaſon. *M.* 19 *E.* 2. *Coron.* 387. *vide ſimile* 21 *E.* 3. 18. *a. Coron.* 449.

II. In what ſuits.

Approvement lies not in an appeal of felony, for the de- [228]
lay that may come thereby to the plaintiff. *M.* 15 *E.* 3. *Coron.* 113. 2 *R.* 3. 22. *b.* And therefore, if a party be indicted of felony, and the priſoner becomes an approver, if an appeal for the ſame felony be ſued afterwards, all proceedings upon the approvement ſhall ſtay. 8 *H.* 5. *Coron.* 442.

But if *A.* be indicted of felony, and he becomes an approver, and appeal *B.* as a companion with him in the ſame felony, and *B.* comes in, it ſeems he may not become an approver, and appeal *C.* of the ſame felony, 15 *E.* 3. *Coron.* 113. *Stamf. P. C. Lib.* II. *cap.* 58. *fol.* 147. *a.* tho 11 *H.* 4. 93. *b. B. Coron.* 34. ſeems to be contrary.

(a) *N. Edit.* of the year books, *fol.* 82. *b.*

If

If a man be arreſted and impriſond for ſuſpicion of felony, he cannot become an approver, becauſe he is not indicted. *Stamf. P. C. Lib.* II. *cap.* 55. *Co. P. C. cap.* 56. *p* 129. againſt the opinion of *Strange* and *Hankf.* 6 *H.* 6. *Coron.* 231.

III. At what time a man ſhall become an approver.

After a perſon is abjured for felony, 19 *E.* 2. *Coron.* 387. 19 *E.* 3. *Ibid.* 443. or be outlawd, 21 *E.* 3. 17. *b. Coron.* 452. or otherwiſe attaint, and hath his clergy, 17 *E.* 3. *Coron.* 445. he ſhall not be admitted to be an approver; nor one convict by verdict. 19 *H.* 6. 47. *b. Coron.* 8.

If *A.* be indicted of felony, and plead *not guilty*, and put himſelf upon the country, and the jury is charged with him, yet before the evidence fully heard, and the jury gone from the bar, he may be admitted to be an approver. 12 *E.* 4. 10. *b.* 11 *H.* 7. 5. *b. per omnes juſtic': vide contra* 2 *H.* 7. 3. *a. (b)*, 9 *H.* 5. *Coron.* 440.

But if the whole evidence be heard, then he ſhall not be admitted to be an approver, 21 *E.* 3. 18. *Coron.* 449. 2 *H.* 7. 3. ſo that it ſeems much in the diſcretion of the court to admit him to be an approver at any time before verdict given, tho after *not guilty* pleaded. [229] 12 *E.* 4. 10. *b. in B. R.* & 11 *H.* 7. 5. *b. per omnes juſtic'*, which is of greater weight than the other books.

IV. Before whom a man may become an approver.

It may be before the juſtices of the king's bench, or juſtices of gaol-delivery, or juſtices in *eyre*, for they may aſſign a coroner to the priſoner to receive his appeal.

But it cannot be in inferior courts, as thoſe that have *ſoke* and *ſake*, and *infangtheft*, and *utfangtheft*. *Bract. Lib.* III. *cap.* 35.

But in caſe of a royal franchiſe, as a county palatine, or the royal franchiſe of *Ely*, where the biſhop hath juſtices and coroners of his own making, there a felon may become an approver. 29 *E.* 3. 42. *a. Coron.* 462. in the caſe of *Ely*.

Neither can a man become an approver before juſtices of peace, nor *oyer* and *terminer*, for they cannot aſſign a coroner. 9 *H.* 4. 1. *Coron.* 457. 4 *Co. Inſtit.* 165. 169. *Co. P. C.* 130.

V. The manner of approver, and of the allowance of it.

(b) In this caſe the whole evidence had been given, and the jury gone from the bar, which was one reaſon aſſigned by the court, why they could not admit the priſoners to become approvers; ſo that this caſe no way contradicts what is before ſaid; but there was another exception beſides, on which the court laid the greateſt ſtreſs, becauſe they only prayed a coroner, but did not acknowledge the felony.

Before

Before any man ſhall be admitted to be an approver, he muſt confeſs the indictment in open court, and pray a coroner to be aſſigned him, and regularly this is to be done upon his arraignment, before plea pleaded, tho, as hath been ſaid, his confeſſion hath been ſometimes admitted after *not guilty* pleaded. 11 *H.* 7. 5. *b.* 12 *E.* 4. 10. *b.* and therefore if he hath pleaded before *not guilty*, and then prays a coroner without confeſſing the felony, the inqueſt ſhall be taken, and if found guilty he ſhall be executed. 2 *H.* 7. 3. *a.* adjudged; and if he hath not pleaded to the country, but prays a coroner, and will ſay no more, he ſhall have *peine fort & dure*, tho the book of 1 *H.* 5. *Coron.* 441. be that he ſhall be hanged.

Upon confeſſing the felony, and praying a coroner to be aſſigned, the court doth theſe things.

1. They aſſign him a coroner to take his appeal. 2. They prefix him a time to make his appeal, ſometimes three, ſometimes four days. 8 *H.* 5. *Coron.* 439. 12 *E.* 4. 10. *b.* 26 *Aſſiz.* 19. 3. He ſhall be removed out of the ſtrait cuſtody, and make his appeal before the coroner, that he may not have any juſt pretence to ſay it was by dureſs or conſtraint, 12 *E.* 3. *Coron.* 169. and therefore, [230] if upon the coming back of the approver to the court, he wave his appeal, as being made by dureſs and againſt his will, the coroner ſhall be examined touching it upon oath; and if he affirm it was made *de bon grè*, the appeal ſhall ſtand, but the approver ſhall be hanged. 22 *E.* 3. *Coron.* 255. 12 *E.* 3. *Coron.* 169. 4. The coroner muſt put his appeal into form, and when the priſoner comes back into the court, he muſt repeat his appeal, and ſhall not be helped by the court or any by-ſtander, 26 *Aſſiz.* 19. and if he miſs in repeating his appeal in any matter of moment, as the colour of the horſe, *&c.* he ſhall be hanged; for if he miſtake in ſuch circumſtances, which muſt need come from his own memory and information, it is a ſign it is feigned. 5. If he make not his appeal before the coroner in the time prefixt, he ſhall be hanged; and if he make it, and diſavow it when he comes into the court, he ſhall, upon the examination of the coroner upon oath, be hanged. 6. If he appeal one, who by his own confeſſion is not in the kingdom, he ſhall be hanged. 2 *E.* 3. *Coron* 153. for he cannot be attaint at his ſuit. 7. After his appeal made he ſhall have an allowance of 1 *d. per diem* by the book of 12 *E.* 4. 10. *b.* 26 *Aſſiz.* 19. 8 *H.* 5. *Coron.* 439. three half-pence

per

per diem per Britton, and by *Forteſcue* 21 *H.* 6. 34. *b.* nothing at all, till he hath convicted the appellee.

VI. Touching proceſs upon an appeal by an approver.

It is to be known, that altho a coroner cannot receive an original appeal but of ſuch felonies as are committed in that county whereof he is coroner, yet if a felon become an approver, the coroner may take an appeal of any felony, tho committed in a foreign county. 9 *H.* 5. *Coron.* 437.

Altho it ſeems, that book is not law, for he can appeal only in the county where he is indicted, and he cannot be indicted in one county of a felony committed in another county, therefore *quære librum*; it ſeems it muſt be intended where *A.* is indicted in the county of *B.* and taken in the county of *C.* and there the coroner receives his con-
[231] feſſion and appeal, which poſſibly he may do without any ſpecial aſſignment *virtute officii*, as he may take an abjuration of a priſoner in a foreign county.

But the coroner in that caſe cannot make proceſs againſt the appellee in a foreign county, 29 *E.* 3. 42. *a.* *Coron.* 462. but he may in the ſame county, *Stamf. P. C.* 146. *a. b.*

And therefore the biſhop of *Ely* having the royal franchiſe of *Ely*, and juſtices and coroners of his own, and alſo having franchiſe of *retorna brevium* in divers hundreds in the county of *Suffolk*, and likewiſe a gaol there, a felon indicted and in priſon at *Ely* became an approver before the coroner of the franchiſe of *Ely*, and appeald one in the biſhop's gaol in his hundred in the county of *Suffolk*, the coroner of *Ely* cannot make proceſs to the biſhop's bailiff of his liberty in the county of *Suffolk* to bring the appellee to *Ely*, which is in another county, *viz.* *Cambridgeſhire*, ajudged 29 *E.* 3. 42. *a.* *Coron.* 462.

At common law it ſeems, if an approver appeal parties that are demurrant in a foreign county, there could be no proceſs made but in the king's bench, by removing the record thither by the juſtices of gaol-delivery, before whom the parties became an approver.

But this is remedied by the ſtatute of 28 *E.* 1. *de appellatis*, whereby power is given to juſtices of gaol-delivery to iſſue proceſs to the ſheriffs of foreign counties to take the appellees, and bring them before the juſtices in that county where the appellor is indicted.

If the appellor allege the place, whereof the appellees are, (as he muſt), and thereupon proceſs iſſues to the ſheriff of that county, and he return there are no ſuch perſons in his bailiwick, 25 *E.* 3. 42. *b.*

or

or *non ſunt inventi*, 21 *H.* 6. 34. *b.* the approver ſhall have judgment and be executed, and he ſhall not be received to ſay they are in another county, and pray proceſs thither. 22 *E.* 3. *Coron.* 460. for if he be once found falſe in what he ſaith, he ſhall not be credited in any thing, but his appeal ſhall be preſumed untrue: *vide* 21 *H.* 6. 34. *b.* *Coron.* 456.

If the approver die before his appeal determind, or be executed for the felony, 21 *E.* 3. 18. *a.* 21 *E.* 3. 17. *b.* *Coron.* 452. or hath the advantage of his clergy, 3 *E.* 3. *Coron.* 369. or diſavows his appeal, and will not proſecute it, 21 *H.* 6. 34. *b.* 3 *H.* 6. 50. *b.* yet proceſs ſhall be continued againſt the appellee at the king's ſuit, and the appellee, if he come in, ſhall be arraigned, for the appeal was well commenced, and it ſtands as an indictment, by reaſon of the great preſumption that a man that confeſſeth himſelf guilty, would not charge another falſly to be companion with him in the ſame felony. [232]

But if the appeal were never well commenced, as if the appellor were convicted by verdict or outlawry, *de quibus infra*, or if the king pardons the approver after the approvement made, and before trial, 47 *E.* 3. 16. *a.* *Stamf. P. C. fol.* 149. *a.* the appellee ſhall be diſcharged without arraignment at the king's ſuit, or further proceſs upon the appeal; for now the approver having his pardon is ſure to eſcape, and therefore ſhall not be truſted in his proſecution againſt another for the ſame felony. But of theſe matters farther under the next head.

If the appellee be returned *non inventus*, the appellor, as hath been ſaid, may be executed, but proceſs of outlawry ſhall iſſue againſt the appellee, as it ſeems not by one *capias* and *exigent*, but by *capias*, *alias*, *pluries* and *exigent*; *quære*.

VII. Touching proceedings upon the appeal after appearance of the appellee.

He that is appeald ſhall not be let to bail but in three caſes: 1. If the approver be dead. 2. If the perſon appeald be of good fame. 3. If the appellor wave his appeal. *Weſtm.* 1. *cap.* 15. *(a)*. *Stamf. P. C. Lib.* II. *cap.* 18. *Fol.* 74. *a. b.*

And therefore, if *A.* be ſeverally appeald by two approvers, *B.* and *C.* indicted ſeverally of ſeveral felonies, and *A.* join battle, and van-

(a) 2 *Co. Inſtit. p.* 188.

quiſh *B.* yet he ſhall not be let to bail till the appeal of *C.* be determind. 25 *E.* 3. 42. *b.*

[233] When the appellee comes *in* he may take his legal exceptions to the inſufficiency of the appeal, as that the appellor is not in priſon but at large, 21 *E.* 3. 18. *a. Coron.* 448. 6 *H.* 6. *Coron.* 231. or that the appellor is within age, or above ſeventy years old, or a woman, or maimed, whereby the appellee loſeth his trial by battle. *Stamf. P. C. cap.* 58. *fol.* 147. *b.* or that he is a clerk convict, and hath not made his purgation. 17 *E.* 3. 13. *a.* or that he is abjured the realm. 19 *E.* 2. *Coron.* 387. or that he was convict by verdict before he appealed of the ſame offenſe: *Vide Co. P. C. cap.* 56.

Alſo he may have all thoſe exceptions, which an appellee at the ſuit of a lawful perſon either by writ or bill may have, as that the plaintiff is outlawd for another felony, or in a perſonal action, but if he hath obtained his pardon, the appellee ſhall be put to anſwer, as in another appeal. 21 *E.* 3. 17. *b.* but if the approver be pardoned *that* felony, upon which he makes his appeal, the appellee ſhall not be put to anſwer neither at the party's ſuit, nor at the ſuit of the king. 47 *E.* 3. 16. *a. ubi ſupra.*

If the appellee hath no exceptions to the appeal, or to the diſability of the appellor, but pleads to the felony, he may put himſelf upon trial, either by battle, or by the country.

Touching the form of the trial by battle, I ſhall make no long narrative at this time, becauſe it is an unuſual trial at this day, and beſides, it will come more aptly in another place.

If when battle is joined they come to the combat, and the appellee be vanquiſhed, it is an attainder of the appellee, and the appellor ſhall have the benefit of the king's grace and a pardon *tanquam ex merito juſtitiæ.*

But if the approver appeals ſeveral perſons, and they ſeverally join battle, the appellor ſhall not have his pardon till he vanquiſh them all ſucceſſively, for if he be vanquiſhed by the laſt, or diſavow his appeal againſt the laſt, he ſhall be executed. 41 *E.* 3. *Coron.* 98. 21 *H.* 6. 34. *b. Coron.* 456.

And *note*, that, if in the field when they come to battle, the appellor diſavow his appeal, the approver ſhall be executed, and the appellee deliverd without being arraigned at the king's ſuit, for his diſ-

diſavowing in the field is *quaſi* a trial in fact. 21 *H.* 6. 34. *b.* *Coron.* 456. *Stamf. P. C.* 148. *a. b.*

But if before the deraigning of battle the approver diſavow his appeal, the approver ſhall be hanged, but the appellee ſhall be put to anſwer at the king's ſuit, for it may be the king hath other evidence beſides the approver to convict him.

If *A.* becomes approver, and appeals *B. C.* and *D.* of the ſame felony, and in his combat with *B.* becomes recreant, *B.* ſhall be diſcharged, but the appeal ſhall ſtand againſt *C.* and *D.* 41 *E.* 3. *Coron.* 98.

If three be indicted for the ſame felony, and they become approvers, and the appellee joins battle with them all, he ſhall perform it ſeverally; but if he vanquiſh one of the appellants, he is thereby acquitted againſt all the reſt, and the approvers ſhall be executed, and the appellee deliverd. 7 *E.* 3. 12. *a.*

But if the appeal be of ſeveral felonies, tho he vanquiſh one appellant, he muſt fight ſucceſſively with the reſt. 19 *H.* 6. 35. *a.* 47 *E.* 3. 5. *a.* for the charges are ſeveral by the ſeveral appellants.

If the appellee puts himſelf upon trial *per patriam*, the approver ſhall be ſworn as well to the petit jury upon the trial when he gives his evidence, as well as make a general oath at the time of his firſt becoming approver, and hence he is called *probator*, (*quod tamen quære*, becauſe he is a perſon convict,) ſo that altho he were a partner in the offenſe, and tho he ſtand indicted of it, and tho he be convicted by his confeſſion, yet he is admitted a witneſs upon his own accuſation or appeal, and the reaſon is, becauſe he accuſeth himſelf by his confeſſion, as well as he doth the appellee by his appeal, and therefore gains a probable credibility of his teſtimony.

And therefore *P.* 19 *Jac.* in the ſtar-chamber, *Noye's Rep. p.* 154. in Sir *Percy Creſby's* caſe, one defendant, that accuſeth not himſelf, is not admitted as a witneſs to convict his companion, but if he accuſe himſelf, he is a witneſs againſt his companion.

But this teſtimony or evidence is not concluſive to the jury, for the jury may conſider as well the credibility or not credibility of the witneſs, as the matter he ſwears. [235]

And altho it ſeems it is now no plea for the appellee to ſay, he is *boni nominis & famæ, & in franco plegio & in aſſiſâ domini regis, & habet dominum, qui ipſum advocet*, as it was in *Bracton's* time, it is

good evidence for the the priſoner, if there be no other evidence againſt him but the teſtimony of the approver; and therefore, if the appellor die, yet the king may proceed with the appeal, becauſe tho he cannot have the teſtimony of the approver himſelf, yet there may be other evidence of the fact.

But yet, when the approver is dead after his appeal, and before trial, the party is bailable, becauſe much of the evidence, which may conduce to the conviction, namely the oath of the approver, is loſt, and ſo leſs probability of his conviction.

If the approver be vanquiſhed and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment muſt be entred upon his confeſſion; for his bare confeſſion of the felony is a conviction, it is true, but not an attainder till judgment given, *quòd ſuſpendatur per collum*, which is not preſently entred upon his becoming approver, but when either by trial, or for any other cauſe before ſhewn, the court thinks not fit to ſpare his execution.

And on the other ſide, if the appellee be convict by verdict or battle, or ſlain upon the field, yet judgment muſt be given, *quòd ſuſpendatur per collum.* 8 *E.* 3. *Judgement* 225. And in that caſe, altho the life of the approver is ſaved, yet he ſhall be baniſhed, unleſs he obtain the king's pardon. *Stamf. P. C. Lib.* II. *cap.* 52. lord *Coke P. C. cap.* 56. ſaith he ſhall have a pardon *ex debito juſtitiæ*, And thus far concerning approvers.

I ſhould now conſider the buſineſs of abjuration, which is always accompanied with a confeſſion of the felony before the coroner, but becauſe *that* was a kind of appendant to ſanctuary, which is wholly and finally taken away by the ſtatute of 21 *Jac. cap.* 28. I ſhall not incumber myſelf with that buſineſs.

See Index to 2 Hawk P. C. tit. Pleading. Index to 2 Hawk. P. C. tit. Approver. Burn. tit. Approver. 4 Blackſ. Com. ch. 25. p. 329. ch. 27. p. 346. ch. 33. 418. Index to 2 Hawk. P. C. Tit. Battel.

CHAP.

CHAP. XXX.

Concerning the pleas of the priſoner *upon his arraignment, and firſt, concerning* pleas in abatement of the indictment.

THE priſoner upon his arraignment either confeſſeth, or pleads, or ſtands mute; the firſt of theſe is diſpatched in the former chapter, the ſecond matter comes now to be conſidered, *viz.* his pleas upon his arraignment.

Pleas upon the arraignment are of four ſorts.

1. Pleas that are declinatory of his trial, and ſuch were antiently the plea of privilege of ſanctuary, and the plea of clergy; the former is taken away by the ſtatute of 21 *Jac. cap.* 28. the latter ſtands ſtill in force; but becauſe for the moſt part that benefit is claimed after conviction, and rarely before, I ſhall refer the whole buſineſs of clergy to a diſtinct examination, after I have done with the conviction of the priſoner.

2. Pleas in abatement of the indictment.

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, *viz. Not guilty.*

Now as to pleas in abatement of the indictment, they are of theſe kinds.

I. Such defects as ariſe upon the indictment itſelf, and the inſufficiency of it, which hath been at large conſidered in the 24th chapter; if any ſuch exception be taken by the priſoner, he may pray counſel to be aſſigned to him to manage his exceptions and take more; but he ſhall not have a copy of the indictment *(a)* from the court, but he and the counſel aſſigned may have *oyer* of the indictment, and preſs their exceptions upon it.

But it is rare to take any exceptions to indictments before conviction, unleſs upon indictments removed into the king's [237] bench by *certiorari*, which the court may in diſcretion hear or not hear, but remand the priſoner and the indictment.

And the reaſons, why they are not taken in the country before conviction are, 1. Becauſe he may have the ſame advantage of the

(a) But now by 7 *W.* 3. *cap.* 3. in all caſes of treaſon, which works corruption of blood, or of miſpriſion of ſuch treaſon, the priſoner ſhall have a copy of the indictment.

exceptions after the trial and before judgment, as before trial. (*) And 2. Becauſe if the exceptions appear material, the court can quaſh that indictment, and direct a new bill to be ſent out to the grand jury, wherein theſe faults may be amended, and the priſoner arraigned *de novo*.

II. Such defects as are in matters of fact, as *miſnoſmer*, or falſe addition of the priſoner.

As to the plea of *miſnoſmer*: In appeals or actions between party and party, or in indictments, if the defendant plead *miſnoſmer*, he muſt be careful that he conclude not himſelf by the manner of his pleading.

Therefore, when *Alan Gerard* was committed upon a *capias* in felony, the pleading was *& ſtatim ductus ad barram in propriâ perſonâ, & quæſitus quomodo ſe velit inde acquietare ſtatim dicit, quod ipſe habet nomen* Johannis Allen, *& non* Alani Gerard, and pleads over to the felony *not guilty*, and the king's attorney replied, that *tempore indictamenti prædicti fuit & adhuc eſt cognitus tàm per nomen* Alani Gerard, *quàm per nomen* Johannis Allen, *& quòd culpabilis eſt de felon' &c. Et hoc petit quod inquiratur per patriam, &c. ideo venit inde jurata, & prædictus* Alanus Gerard *per nomen* Johannis Allen *traditur in ballium: Vide* 6 *H.* 7. 7. *a.*

In an appeal or other action at the ſuit of the party *miſnoſmer* is a good plea.

[238] If the defendant in an appeal or indictment plead *miſnoſmer* of his ſirname, the plaintiff or king may aver, *que conus per un noſme & l'autre.* 1 *H.* 7. 29. *a.*

But in an appeal or action at the ſuit of the party, if *miſnoſmer* be pleaded of the chriſtian name, the plaintiff muſt take iſſue, and cannot plead *conus per l'un noſme & l'autre.* 1 *H.* 7. 29. *a.* 21 *E.* 3. 47. *b.*

In an indictment of felony if the priſoner plead *miſnoſmer* of his chriſtian name, ſome books hold it a good plea. 11 *H.* 4. 41. *b. Miſnoſmer* 18. *Stamf. P. C. Lib.* 3. *cap.* 18. *fol.* 181. *b.* but other books of greater and later authority be to the contrary. 1 *H.* 5. 5. *b.*

(*) But now by 7 *W. cap.* 3. no indictment for high treaſon, whereby any corruption of blood may be made, or for miſpriſion of ſuch treaſon, nor any proceſs or return thereupon ſhall be quaſhed for miſ-writing, miſ-ſpelling, falſe or improper *Latin*, unleſs exception be taken in court before any evidence given upon ſuch indictment, nor ſhall any ſuch miſ-writing, &c. be any cauſe to arreſt judgment after conviction, but ſuch judgment may nevertheleſs be reverſed upon writ of error, as if this act had never been made.

Miſ-